Supreme Court, U.S.
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No.

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In the
**SUPREME COURT of the UNITED STATES**

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ROBIN and KAREN ZAHRAN

*Petitioner,*

v.

CLEARY BUILDING CORPORATION, a Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Lower Court's defected from the basic, declared, and normal course of judicial proceedings resulting in the confiscation of Zahrans constitutional rights, including the right to a fair hearing and due process by an impartial court of law calling for this court to exercise its supervisory powers relating to Zahran's rights of equal protection pursuant to the fourteenth amendment, and whether the Lower Courts reached their conclusions through the misapplication of the law to the facts under the circumstances caused by their prejudicial views of Zahrans and whether the Lower Courts demonstrated bias and prejudice against Zahrans throughout their rulings without regard to the applicable laws or facts.

2. Whether the Lower Courts failed to apply the Federal Rules of Civil Procedures to Zahrans Rule 59 Motion after trial.

3. Whether the Lower Courts abused their authority in refusing to order a new trial where a new Judge entered the case in the midst of a Jury Trial without the availability of the trial transcripts necessary to familiarise him/her with the proceedings before orders are made.

4. Whether the Lower Courts misapplied the law by failing to sustain Zahrans objections regarding the use of an erroneous and undisclosed deposition transcript for the purposes of impeaching Robin Zahran more than 14 years earlier.

5. Whether the Lower Courts misapplied the law by granting Cleary's motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure and in denying the Zahrans' motion for sanctions against Cleary.

6. Whether the Lower Courts deprived Zahrans of their rights to counsel by depriving Zahrans of their right to terminate their attorney upon observing he was deaf in one ear, and wasn't prepared for trial resulting in loss of their rights to due process and assistance of counsel.

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## OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the 7th Circuit is set forth in the appendix page 116-124. The opinion of the United States District Court dated 9/23/97 is set forth in appendix page 20. The decision of the United States District Court for the Eastern District of Wisconsin dated 2/14/1995 is set forth in appendix page 3-13. All the decisions are unpublished and unrecorded.

## STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statuary provision for this court's jurisdiction is 28 USC 1254. The United States Court of Appeals of the Seventh Circuit issued its decision on 6/21/99. Honorable Judge Stevens granted 60 day extension. The petition is therefore being timely within the 90 days of the panel rehearing denial and the extension of time granted.

The original jurisdiction was vested in the United States District Court pursuant to 28 U.S.C. } 1332 based on diversity of citizenship. The court of appeals for the United States Seventh Circuit had jurisdiction pursuant to 28 U.S.C. } 1291.

## CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

The First, the Sixth, the Seventh and the Fourteenth Amendment of the United States Constitution, the Bill of Rights, the establishment clause, Rule 1, 11, 11 (c)(3), 12, 41, 60(b), 59(b) 63, 68(b), 609, 609(b), 803, 404(b), 804(b)(1), 1006, 801, of the United States Code of Civil Procedures and rule 455 USC and Federal Rules of Appeal Procedures Rule 12 (b) and Federal Rule of Civil Procedure Rule 26 and the local rule of the Seventh Circuit and the local rule for the US District Court for the Eastern District of Wiscosin.

## STATEMENT OF THE CASE

### Course of Proceedings & Disposition of the Case Below

This action was brought in the U.S. District Court for the Eastern District of Wisconsin based on diversity of citizenship against Ralph Uecker & Sons, Inc.("Uecker") and Cleary Building Corporation ("Cleary") for breach of contract, negligent construction and a fraudulent filing of a lien by Defendant, Cleary. The Plaintiffs, Zahrans, are residents of Illinois. Cleary and Uecker are Wisconsin corporations.

### Background

On July 8, 1990, a suspicious fire damaged several buildings at Acorn Hills Farms owned by Zahrans which were insured by Frankenmuth Insurance Company. Frankenmuth delayed the adjustment of the claim and demanded that Zahrans refrain from rebuilding to preserve evidence until the investigation was completed, inferring arson by Zahrans. Zahrans complied.

On September 21, 1990, before Frankenmuth completed its investigations or made any payments, Zahrans entered into a contract with Cleary and Uecker for rebuilding the burnt property on the condition that they start the building process on November 1st, 1990. App. pg. 1,2. On 10/31/1990, Frankenmuth paid the amount of $99,995 alleging that it was the accurate assessment of loss to the building structures per insurance contract.

Zahrans paid the required down payments to Cleary before receiving compensation from Frankenmuth and informed Frankenmuth that the rebuilding will start on November 1, 1990 at the latest due to approaching winter conditions as it was necessary to protect the animals from the weather elements of Wisconsin winter.

Cleary appeared at the scene on Nov. 21, 1990, not November 1 as called for in the contract. App. pg. 2. They delivered some but not all the supplies needed for rebuilding and paid for by Zahrans. As a result of the delay by Cleary, in the start up of the rebuilding the dairy herd was exposed to the elements of weather and became contaminated with diseases and infections, resulting in loss of milk production, and death of livestock as alleged in Zahran's complaint 92 C 543.

Zahrans, as a result, sued Frankenmuth for breach of insurance contract, delays of payments, and improper adjusting of loss, along with Cleary and Uecker for breach of contract which lead to milk and livestock losses. (Case no. 90-C-808).

Zahrans' attorneys opposed Frankenmuth's motion to consolidate this case with the earlier tornado litigation upon Frankenmuth's Motion to Consolidate and failed to properly serve Cleary with the summons and complaint. Honorable Judge Curran presiding dismissed Cleary from that complaint for improper service and forbade Zahrans from filing a joint complaint against Frankenmuth and Cleary for the damages sustained, and dismissed Zahrans' action against Frankenmuth for delays and bad faith. A jury found that Frankenmuth's payments in the amount of $99,995. pursuant to the insurance policy were adequate and that Frankenmuth owed no more. On appeal the Seventh Circuit affirmed the lower court.

Zahrans' attorneys, who represented them in the tornado litigation and in the adjustment of the fire claims, failed to consolidate Zahrans' complaints. They kept the fire case separate from the tornado litigation and objected to Frankenmuth's motion to consolidate all issues of disputes between Zahrans and Frankenmuth which helped losing both cases and increased the cost. At a later date Zahrans, filed a legal malpractice action against their previous attorneys for negligence and breach of contract, of which the district court dismissed, and the appeal court affirmed. These issues are

currently pending on a petition for writ of certiorari before this court petition, No. 99-1042.

In early 1991, Cleary filed an action in Manitowoc County, Wisconsin against Zahrans to enforce and collect on an alleged lien amount of approximately ($48,000) filed against Zahrans' property in Manitowoc County before the building was completed. This amount was far in excess of Zahrans' written contract obligations in the amount of ($25,000). Zahrans filed an objection in the county courthouse to Cleary's action based on the fact that the amount claimed was not owed. Zahrans filed no pleadings or claims against Cleary for their act of filing a fraudulent lien because it was already plead in their action pending in the U.S. District Court. The state circuit court pursuant to arbitration agreement between the parties found that Cleary did not complete the building properly and ordered Cleary to complete the building pursuant to contract provisions before the final payment in the required amount of $25,000 is made. Cleary substantially complied with the arbitrator's decision and order and completed the building in 1993. Accordingly, Zahrans made the final payment due upon completion as called for in the contract and the arbitrator's order.

In the U.S. District Court in Milwaukee, Cleary moved to dismiss Zahrans' complaint and for summary judgment, and for Rule 11 sanctions. Judge Evans denied Cleary's motions with prejudice in 2/14/95, App. pg. 3-13, ruling that the case should go to the jury with the exception of the lien filing issue as it had been settled after the complaint was filed in the state court.

The Honorable Judge Evans, U.S. District Judge for the Eastern District of Wisconsin presiding, moved to the U.S. Seventh Circuit Court of Appeals. The case was then reassigned to the late Honorable Judge Robert Warren.

After discovery and the reassignment of the case to the Honorable Judge Warren, a jury trial started on 11/05/96. Cleary, in their opening statement, argued to the jury that Zahrans' checks made to Cleary in consideration for Cleary's promises and obligations under the contract bounced, and that Zahrans stopped payment on other checks made for the payment of supplies and materials. Upon objection and a side bar, Judge Warren issued specific instructions and directed Cleary's attorneys to draft a statement to be read to the jury to clarify and correct Cleary's statements referencing the checks which in fact were false. Judge Warren's reasoning was made to correct the record and avoid prejudicing Zahrans and Cleary and avoid a declaration of a mistrial. Cleary's attorney agreed with no objection.

During the trial, and upon Zahrans' observations that their attorney was not prepared, deaf in one ear and realizing his inability to hear all questions, replies, objections and testimonies at trial, terminated his services. The court, upon being informed of Zahrans' decision, did not allow that termination even though Zahrans presented to the court that they will be able to proceed pro-se and finish the trial to verdict without interruptions or delays. The court directed that Attorney Bickley carry on the trial.

On the day it became known that Judge Warren was ill and in the hospital (at approximately 9:30 a.m), Judge Clevert appeared in the courtroom, he called the jury and advised them that he was new to the case and that he needed to spend time to work out some details and understand the issues. He then sent the jury to their room. Judge Clevert requested information on the case from both counsels as to the status of the trial and the case. The attorneys summarised the testimony up to that point of trial and of the party's positions and claims, allegations, and proofs. Judge Clevert, on that same day at approximately 11:00 a.m., declared that he will proceed and continue the entire trial

with no interruption. No court transcripts were prepared nor read nor were they available.

In summarizing the case and the issues to Judge Clevert at his request, Judge Clevert was told by the Defendants that this case was tried before Judge Curran against Frankenmuth as a Defendant and that it did rise upon the same damages and facts being alleged in this litigation. Judge Clevert advised the parties that he is aware of the various intricacies involving Frankenmuth's previous litigations and the adjudication of the specific claims in the fire of July 8, 1990 and the tornado litigation before it, as well as the appeals and the writs of certiorari.

Judge Clevert was not aware of the numerous motions and issues pending as of that time before the court of which Judge Warren had specifically directed the attorneys to address. He did not have time or the ability within one hour to familiarize himself with the pleadings, motions, and positions of the parties without the trial transcripts or reading all pleadings on file in such a short period of time.

Cleary's attorney refused to draft the statement to be read to the jury as Judge Warren directed. Judge Clevert failed to enforce what had been agreed upon between the parties and ordered by Judge Warren although it was brought to his attention more than once.

Judge Clevert did not hear almost the entire testimony of Zahrans' case presentations. During the trial and while Judge Warren was presiding, an exhibit was introduced by the Plaintiffs of which it showed the firm contract start date of November 1, 1990 as the date the rebuilding was agreed upon between the parties to start. That contract exhibit was later removed from the jury box by Cleary's attorney after Judge Clevert took over the case and the jury never saw it.

Zimmerman (one of Cleary's two witnesses) was allowed to testify that he was aware of the contract provisions

between Zahrans and Cleary, although he was never involved in the contract negotiations, payments, or the executing of its provisions. His knowledge was entirely based on what he read, thought he read and on what others said of whom none were witnesses at trial or present during the formation of the contract between the parties.

Zahrans' objected to Zimmerman's testimony and his explanation of the contract based on hearsay since he had no prior personal knowledge, and was only interpreting the contract according to his views. The court overruled and warned Zahrans" attorney to stop objecting and move on. Judge Clevert denied Zahrans' attorneys motion for a side bar or to be heard on record in absence of jury and directed him not to object any further or risk being in contempt.

At the jury instruction conference, Judge Clevert ordered that Zahrans could only pursue one theory of damage claims and must choose jury instructions either upon negligence or upon breach of contract theory, but not both.

In Cleary's cross-examination of Robin Zahran, Cleary misquoted a previous deposition statement attributed to Robin Zahran of more than 14 years earlier and attacked Robin Zahran's credibility on an irrelevant matter that was clearly misquoted. Zahran was not given a chance to explain the misquoted statement.

After the jury instructions were given and closing arguments were made, the jury returned a verdict against Zahrans and for Cleary and Uecker. App. pg. 20-22. Zahrans filed their motion for judgement notwithstanding the verdict based on fraud and tampering with the jury exhibits and evidence and for other procedural matters, or in the alternate, a declaration of a mistrial and a new trial.

At the hearing on the post trial motion, Zahrans argued to the court that Cleary's removal of the admitted exhibit which showed the Nov. 1, 1990 date as the erection date and its

replacement with another exhibit that did not contain the November 1, erection date as a tentative erection was fraud upon the court and tempering with evidence, enough to justify a declaration of a mistrial and a new trial. Judge Clevert, after examining the exhibits, agreed that the exhibits are different, but declared that such act can not prove fraud and denied Zahrans' motion and affirmed his prior rulings.

For representation on appeal, Zahrans retained Attorney Andy Cohen. The circuit panel Honorable Judges, Bauer, Kanne and Flaum issued an order dated Sept. 17, 1998 in another matter somehow related to Zahran's farm and Frankenmuth claim. That order clearly showed that the panel have either held or developed bias tendencies against Zahrans and that they were inclined to rule no matter what against them. App. pg. 26-40.

In their appeal brief Zahrans contended that the district court abused its discretion by denying Plaintiffs' motion pursuant to rule 59 of the F.R.C.P. and that Judge Clevert didn't mind Cleary's attorneys actions of committing fraud upon the court committed through the removal of the accurate contract exhibit, App. . pg 14-9, and replacing it by a fraudulent one. Zahran's further argued that the failure to abide by Judge Warren's rulings prejudiced Zahrans, and that Judge Clevert seemed not to have cared or been concerned by prior rulings in the case by the previous judges. In fact, he overturned and discarded their rulings as evidenced by the trial transcripts. .

Zahrans argued that Judge Clevert missed the majority of Plaintiffs' case presentation, including the testimony which led to the admission of the original contract which was later removed by Cleary's attorneys and replaced by an erroneous one and that Judge Clevert's allowance of Cleary's witnesses to testify referencing the contract specific details and provisions, at the time these witnesses had absolutely no prior knowledge of the negotiations or the meeting of minds between the parties

was contrary to the evidence admissibility rules prejudicial and detrimental to the outcome of Zahrans' case.

Zahrans and Attorney Cohen realized that Zahrans will not have a fair hearing on appeal in the Seventh Circuit especially, from that panel as appears in their tone and order of 9/17/1998, combined with Attorney Cohen's statement to Zahrans that the law clerks of certain appeal court panel judges told him personally that the judges directed their law clerks to discard Zahrans' pleadings and draft orders ruling against Zahrans upon receipt of motions or briefs.

Attorney Cohen suggested that he will go to the Supreme Court and move the Honorable Justice Stevens to stay the order dated Sept. 17, 1998 pending a determination by the Supreme Court on the panels constitution and motion to transfer or re-assignment of the case and the panel disqualification. App. pg. 41-47.

Attorney Cohen filed the motion with the Supreme Court as promised to Zahrans and faxed a copy to Zahrans on Nov. 4, 1998, informing Zahrans that he allegedly filed the motion for stay of the order of 9/17/98. App. pg. 48-49. And that he filed a copy of that motion with the appeal court. App. pg. 41.

In keeping up with the development of their appeals, Zahrans questioned Attorney Cohen referencing the status of their motion with the Supreme Court and the status of their appeal briefs with the 7th Circuit. Upon receiving unclear answers, Zahrans contacted the clerks of both the 7th Circuit and the Supreme Court, who informed Zahrans that no motion for stay or a copy for a motion to stay was pending in the 7th Circuit nor was a motion properly filed with the Supreme Court as the motion was returned because Attorney Cohen was not admitted to practice before the Supreme Court. Attorney Cohen knew that he was not admitted to practice before the U.S. Supreme Court. and in fact, received back unfiled the

motion to stay the 9/17/98 panel's order but failed to inform Zahrans. Attorney Cohen filed the three opening appeal briefs without showing them to Zahrans contrary to their agreement.

Upon discovery of Attorney Cohen's fraudulent acts, Zahrans' moved the court on 12/18/98 to allow them to file their own appeal briefs. App. pg. 50-59. The panel granted Zahrans' motion to file supplemental briefs in these appeals and set a briefing schedule in which Zahrans were to file the three appeal briefs within a 20 day period. App. pg. 60-62. The first of which was due within one week.

Upon receipt of the 7th Circuit's panel decision on 12/28/98. Zahrans moved the court for extension of time, App. pg. 69-72, and moved the court to direct Attorney Cohen to turn over Zahrans' files to them so they could prepare adequate briefs especially where he filed a motion to withdraw. App. pg. 63-66. The panel denied Zahrans' motions App. pg. 73-75, and allowed Attorney Cohen to withdraw by granting his motion in April, 1999 after all the briefings were completed while he kept all of Zahrans' files, documents, trial transcripts and research made over the years.

The panel refused to allow Zahrans more than 20 days over the holiday to prepare their appeals without access to their files upon Zahrans discovery of fraud committed by Attorney Cohen, that subject of the bias of the panel was addressed in petition for writ of certiorari. App.

On June 21, 1999, the appeal court panel issued an order unpublished order stating in summary that they were affirming the District Court's rulings and reasonings, rejecting all of Zahrans' arguments on appeal. App. pg. 116-124.

Zahran earlier moved to disqualify the panel judges. App. pg. 89-91. And the court denied that motion. App. pg. 92-93.

On March 29, 1999 the US District Court for the Eastern District of Wisconsin corresponded that they filed the record on appeal with the district court. App. pg. 95-96.

On April 22, 1999 Zahrans again moved for the disqualification of the panel of judges. App. pg. 97-103. Again, the court denied.

Zahrans filed a complaint with the office of the chief judge of the Seventh Circuit referencing the panels judges. App. pg. 104-112. The chief judge declined to carry out investigation referencing Zahran's allegations.

The appeal court on 6/21/1999 issued various orders denying Zahran's motion to strike, Cleary's and Uecker's Appeellees briefs for being untimely as Zahran's were treated. App. pg. 114-115. The panel further affirmed the District Court judgment, App. pg. 113 and issued its unpublished order affirming the district court orders. App. pg. 116-124.

The court further on July 13, 1999 issued its mandate stating there was no record on file in the case filed by the District Court. App. pg. 127-128.

## ARGUMENT

**1. The Appeal Court panel and Judge Clevert of the District Court demonstrated bias and prejudice against Zahrans throughout their rulings and were predisposed to rule against Zahrans without regard to the applicable law or facts.**

The panel's order of Sept. 17, 1998 clearly demonstrates that the panel had developed bias tendencies against Zahrans, forecasting that they will be ruling against Zahrans as evidenced by their orders and refusal to allow Zahrans more than 20 days over the holidays to prepare their appeals without access to the files as they were kept in the possession of Attorney Cohen.

The panel abused Zahrans' rights to Constitutional protection, of which its enforcement is a mandatory prerequisite to enforcing the constitutional protections that distinguishes democracy from tyranny including those of the judiciary if it steps out of line and the rule of law, because the rights of citizens should evenly be measured to achieve equal protection under the law pursuant to the fourteenth amendment. Because diviation from the norm will give a rise to a prima facia case of discrimination and depravation of constitutional rights to equal protection under the law.

The Constitutional protections and the citizens Bill of Rights must not be denied to no one and it is the moral privilege of those who sit on the Supreme Court to assure that result. Zahrans rights were violated, there was no meaningful review of the lower court's orders, nor was there equal application of the law or an opportunity for a fair trial or a fair review.

Among those basic fair trial rights, as to which an error can never be treated as harmless, is the citizens right to an impartial adjudicator, whether by a judge or a jury. *Gomez v. United States*, 490 US 858, 104 L Ed 2d 923, 109 S Ct. 2237. Judge Clevert, nor the panel of the Seventh Circuit were impartial as demonstrated by their tones and their familiarity with Zahrans and their pursuits to achieve justice referencing Frankenmuth and the rulings by the district courts.

The Appeal Court should not change or adjust the law and the Constitutional doctrine to produce the desired results. Our Constitution and Bill of Rights simply do not allow a ruling of guilty as accused without proof, nor does it give the authority to the Appeal Court to predetermine appeals and reviews absent meaningful review procedures as they did in Zahran's case.

Our Constitution is our protector and our guiding torch from the executive, legislative and judicial branches of government, because if they stray from the norm the

Constitution rises and reminds us all that equal justice under the law is a right that is bestowed on us all and justice is not dependable on personalities, influences and other prejudices The courts below demonstrated their total disregard to Zahran's rights under the law in violation of their fourteenth amendment rights of equal protection. The plain language of the equal protection clause of the fourteenth amendment is to prohibit prejudicial disparities before the law, its protection is applicable to the judiciary with equal force as it applies to the executive and legislative branch of government.

In order to protect the Constitutional rights of fair and proper judicial review. The review must be fair, impartial, unmotivated by other concerns or prejudices, otherwise it is meaningless. James Madison stated it eloquently when he said, "independent tribunals of justice . . . will be an impartial bulwark against. . . every encroachment upon rights, expressly stipulated for in the Constitution." The lower courts in Zahran's case could hardly state they did not have prejudices against Zahrans which affected their decisions because proper judicial review means protection of fundamental rights. And judicial powers should be exercised to enforce the Constitution and the Bill of Rights provisions not those who are especially tied.

In summary as this court held in many court cases, appearance of judicial misconduct or impartiality by any judge should be enough for the disqualification of that judge from ruling on the subject matter of controversy.

The lower courts did not allow jury instructions or special verdict on the theory of contributory negligence as it should have, and gave Zahrans a choice to either submit instructions on jury verdict pursuant to contract or pursuant to contributory negligence and not both contrary to federal law.

Zahrans were entitled to both instructions and special interrogatories as Judge Warren had ruled before he became ill. Judge Clevert didn't allow it. That was an abuse of discretion as

the jury were not properly instructed on the theories of liabilities referencing Zahrans' rights to recover damages as such was opposite Judge Warren's orders because the doctrine of election of remedies has since 1938 been defunct in the federal courts. 8(a)(2). *Medcom Holding Co. v. Baxter Trerenal Labratories Inc.*, 984 F2d 223 229 (C.A.7, 1993) and *All State Ins. Co. v. James*, 779 F2d 1536 1540-41 (C.A. 11, 1986).

**2. The Lower Courts failed to apply the Federal Rules of Civil Procedures to Zahrans Rule 59 Motion after trial.**

Federal Rule of Civil Procedure 60(b) codifies the situations under which a party maybe entitled to relief from a judgement or Order. The Rule states, in pertinent part, as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party.

One of the issues presented by Zahrans in their Motion for Judgement Notwithstanding the Verdict or in the Alternate a Declaration of a Mistrial, was that the most important exhibit had been removed from the exhibit pile and replaced by a fraudulent one. The allegations were that the exhibit which was removed showed that the date of November 1, 1990 was to be the commencement date of the project, not the tentative erection date as argued by Cleary and Uecker at trial to the jury through replacing the actual contract by a doctored one, stating that the November one was a tentative erection date. Zahrans

argued fraud and misconduct to the court as follows and appears in the trial transcript.

THE COURT: And we have to look at what was before the jury. Now are you claiming that the evidence before the jury was not sufficient as a matter of law to warrant a verdict?
MR. ZAHRAN: Yes, Your Honor.
THE COURT: All right.
MR. ZAHRAN: It was tainted evidence.
THE COURT: Well, you're claiming it's tainted. Why?
MR. ZAHRAN: There, the contract was entered into with the Cleary Building and Uecker, and Ralph Uecker and company stated specifically on September 24, 1990 that the November 1 was the erection date. It was confirmed to me on that date and it was stated by Mr. Uecker himself. As a matter of fact, no one disputes as of January 28, 1991, after the entire contract was allegedly, the building was allegedly to be completed Cleary Building demanded further payments. I asked them no, the contract specifically said $73,000. They faxed me the contract which stated the erection date was November 1. there was no tentative date of 11-1-90.
THE COURT: Mr. Zahran, what you're arguing is that is your version of the facts, correct?
MR. ZAHRAN: Yes, Your Honor.
THE COURT: There was evidence in the case, right?
MR. ZAHRAN: There, on that issue there was no other evidence on the case.
THE COURT: Wasn't there evidence regarding when, what the contract says?
MR. ZAHRAN: There was no testimony by Ralph Uecker on - -
THE COURT: But there was, but the documents were submitted into evidence and submitted to the jury for its consideration, right?

MR. ZAHRAN: Yes, Your Honor, For them November 1 - -

THE COURT: And the circumstances surrounding the making of the contract was also before the jury, correct?

MR. ZAHRAN: Yes.

THE COURT: And the jury's function was to determine from the documentary evidence, the testimony and the circumstances what the agreement was?

MR. ZAHRAN: Yes, Your Honor, except that the November 1, date exhibit was taken away from the jury pile, from the exhibit pile.

THE COURT: That's what you're claiming?

MR. ZAHRAN: Yes, Your Honor.

THE COURT: And, you're but not withstanding that there was testimony concerning that exhibit, wasn't there?

MR. ZAHRAN: No, that testimony, Your Honor, to my recollection is this. Mr. Zimmerman came in the picture in May and testified he saw writing of 11-1. Now, the 11-1 was inserted for sure after January 28, 1991. Nobody could dispute that.

THE COURT: The bottom line, Mr. Zahran, is whether the evidence before the jury was legally sufficient, that is, whether a reasonable jury could have found as this jury found. Now, your task at this juncture is to point out that whether or not it was legally, the jury was legally incapable of finding as it did.

MR. ZAHRAN: Your Honor, they could - -

THE COURT: And what I'm hearing from you is something different. That is, our version of the facts. I don't want to hear your version of the facts. I want to know what you believe is sufficient or legally insufficient in this case to support this verdict.

MR. ZAHRAN: My position is everyone decisions are as good as his information. And if the information that went

before the jury was incorrect the verdict naturally would progress to be somehow wrong.
THE COURT: All right. And you're saying that the information was incorrect because a document was taken?
MR. ZAHRAN: The document was the center issue, Your Honor, in this entire matter.
THE COURT: And you have proof that the jury did not receive the correct document?
MR. ZAHRAN: Yes, Your Honor.

but the courts below ignored that argument knowing it was based on facts as demonstrated.

These acts by an attorney and an officer of the court should have been sanctioned and not rewarded by the court as the judges have a responsibility to respect and protect persons from violation of federal constitutional rights. *Gross v. State of Illinois*, 312 F2d 257. Because a judge has a binding obligation to take or initiate appropriate discipline measures against lawyers for unprofessional conduct of which a judge becomes aware. A.B.A. Code of Judicial conduct, Cannon 3 Sub. D2 - *Cotto v. U.S.*,993 F2d 274.

**3. The Lower Courts abused its discretion in failing to order a new trial where a new Judge entered the case in the midst of a Jury Trial.**

It is a well established law that for a new judge to familiarise himself with and to take over a case in the middle of a trial, he must have the transcripts and the previous outstanding court orders before him in order to manage the case and in absence of transcripts, a mistrial should be declared by the new judge to assure a proper verdict. *Gaddy v. ABEX Corporation*, 884 F.2d 312,316(7th Cir. 1989).

On Tuesday, November 12, 1996, Judge Clevert, appeared in the court room and announced that the court was in session. He asked the attorney's to summarize and brief him on

the case and the issues from their own perspectives. Zahran's attorney advised the Court that certain of defendant's attorney's statements to the jury were not true and were to be corrected as was directed by Judge Warren. Judge Clevert took the attorneys' summarization of the case under advisement.

The local rules of the U.S. District Court states that the court clerk's certifications is not a substitute to the trial transcripts if the new judge chooses to continue the trial. And that the new judge must have the trial transcripts before he proceeds further on the case.

Judge Clevert proceeded in the trial without the benefit of observing the jury selection, the opening statements and the first four days of trial testimony and without the benefit of the previous orders by the court on numerous specific issues referencing evidentiary rulings, and various motions. Judge Clevert could not have been familiar with the case to make proper rulings on the admissibility of evidence or exclusions which resulted in prejudice to Zahrans.

The deliberate judicial acts of one judge are not open to review by another judge of the same court having co-ordinate jurisdiction. *Traveler's Indemnity Co. v. U.S. for Use of Construction Specialists Co.*, 382 F 2d 103. Judge Clevert failure to instruct the jury on the lien issue and the issue of the check that Cleary erroneously claimed bounced which was untrue and was directed by Judge Warren was highly prejudicial and a new trial was the only cure. His rulings, in effect, were overruling Judge Warren in violation of the declared law.

Courts have held that when a successor judge in a civil case has yet to issue his findings of fact and conclusions of law a successor judge must retry the case, *Townsend v. Gray Line Bus Company.* 767 F.2d 11, 17 (C.A.1 1985)

Zahrans needed the new judge to hear their case in chief from the beginning to avoid prejudice to their case. *Emerson Electric Comp. v. General Electric Co.*. 846 F.2d 1324 (C.A.11

1988). Judge Clevert did not, a new trial therefore was warranted pursuant to rules.

The law pursuant to Rule 63 is clear, the judge must certify to his familiarity of the case before he takes over and not after as such would be necessary for all his rulings. Courts have held that when a successor judge in a civil case has yet to issue his findings of fact and conclusions of law a successor judge must retry the case, *Townsend v. Gray Line Bus Co.*, 767 F2d 1324 (C.A. 11, 1988), *Medicare Glaser Corp. v. Guardian Photo Inc.*, 936 F2d 1016 (C.A.8, 1991). Because a successor judge could not make the required credibility determinations to decide contract disputes and therefore was required to try the case where the parties did not consent to resolution of case by reference to the trial transcript. F.R.C.P. Rule 63, 28 U.S.C.A. Zahrans did not consent and the various circuits rules are clear on that issue but in Zahrans case the lower court used different measurements to achieve a desired result.

If a court desires to continue the trial will necessarily require that there be available a transcript or a video tape of proceedings prior to substitution and if there has been along but incomplete jury trial, the prompt availability of the transcript or video tape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties. *Whalen v. Forn Motor Credit Corp.*, 685 F2d 272 (C.A. 4 1982) ex Banc; 459 U.S. 910, 1982 cert denied.

**4. The Lower Courts abused their discretion in failing to sustain the objections by Zahrans regarding the use of an erroneous and undisclosed deposition transcript for the purposes of impeaching Robin Zahran, where that transcript was extrinsic evidence of statements being used for impeachment purposes.**

Rule 608(b) of the Federal Rules of Evidence provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, be used if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witnesses (1) concerning the witness' character for truthfulness or untruthfulness, but the rule prohibits the proof of such conduct by extensive evidence." *Simmons, Inc. v. Pinkerton's Inc.*, 762 F.2d 591, 605 (7th Cir. 1985)

During the cross-examination of Robin Zahran, the district court allowed questioning of Mr. Zahran regarding an alleged deposition statement which was taken on May 11, 1984, by confronting Zahran with a deposition transcript and questioning him from that deposition absence prior testimony on direct. During the cross-examination defendants attorney proceeded to read a portion of that transcript into the record in this matter. This deposition transcript was extrinsic evidence of a prior misquoted statement attributed to Zahran and was unrelated to this case whatsoever.

While the deposition transcript was not entered into evidence, the fact that it was read in front of the jury had similar, if not the identical effect as if it had been entered into evidence and may have been worse by creating suspicions in the jury's minds.

However, had Zahran been charged with perjury from that previous testimony, Federal Rule of Evidence 609(b) would have applied to the statement and for that reason the line of questioning would have been excluded, unless there had been sufficient written advance notice of intent to use the deposition transcript, and the judge determined that the probative value substantially outweighed the prejudicial effect.

Zahran wanted to explain the misquotation taken by a court reporter which was never corrected nor was he ever

shown a copy of that deposition at anytime to have a chance to correct such a misstatement. The judge did not allow an explanation and Attorney Hannon kept shouting in front of the jury for an answer either a yes or a no with no explanation or court interference.

Zahran did not testify to such alleged fact on direct testimony nor did he receive any warning that Cleary intended to pursue that tactics of a misquoted incorrect statement from a deposition for impeachment on irrelevant, immaterial and inadmissible evidence under rules of evidence and Rule 803. *Hong v. City of Chicago,* Rule 404(b) 76 F 3d 1233 (C.A.7)

Nor is character evidence admissible to prove such propensity to commit an act if the testimony or evidence is not material per Rule 403 as such is a prerequisite before admitting evidence, as it must be material and relevant. *Desai v. Hersh,* 954 F 2d 1948 (C.A.7 1992) and such rules and laws are essential to ensuring fairness in evidentiary rulings and precludes admission which even if relevant is substantially outweighed by danger of unfair prejudice, confusing of issues and misleading the jury. 804(b)(1) *Horne v. Owens Corningware Fiberglass Corp.*, 4F3d 276. The lower courts motivated by bias and prejudice made sure that the jury's minds were contaminated with suspicions against Zahrans.

Nor did Cleary notify Zahran's of their intention of using exhibits or transcripts of depositions but engaged in a trail by ambush. Relevant evidence is admissible, irrelevant evidence is inadmissible pursuant to Rule 402, and if credibility is to be attacked, evidence is only to be admissible if the character of the witness had been attacked. Rule 608 and the scope of cross examination. should be limited to the subject matter of direct examination matter of *Rhodes,* 886 F 2d 380, Rule 609(b)

The misquoted statement from that deposition was so far removed in times as well as the subject matter from the testimony in this case that it should have been prevented from

being used in that line of cross-examination especially where there was no evidence brought out that the testimony from that deposition was on a matter which was in any way material to the case in which the deposition was taken or if the court reporter admitted at trial that it was the true or properly recorded statement without mistake.

**5. The Lower Courts abused its discretion in granting Cleary's motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure and in denying the Zahrans' motion for sanctions for bringing a frivolous motion for sanctions by Cleary.**

One of the basic purposes of Rule 11 of the Federal Rules of Civil Procedure is, "to deter baseless filings in the district court. . ." *Cooter & Gell v. Hartmarx Corp.. et al.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

Rule 11 requires that an attorney and/or a party certify to the best of their "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that any pleadings or motions presented to the court is not being presented for an improper purpose, and that the allegations and other factual contentions have a legally sufficient basis to support the claim. And when a party requests a court to impose sanctions, it must first give notice of its intent to seek sanctions and provide the attorney or party charged with a reasonable opportunity to respond. In particular, a frivolous argument or claim is one that is "baseless and made without a reasonable and competent inquiry." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc).

On November 14, 1996, after the trial and after the jury verdict was announced, Cleary filed its motion for Sanctions pursuant to Rule 11 alleging five grounds for the Sanctions. This Motion was not ruled upon until March 30, 1998. In the order granting the sanctions, the district court assessed "reasonable attorney fees payable to Cleary Building

Corporation in the amount of $1,500," for proceeding in the district court on a claim against Cleary for filing a fraudulent lien.

The district court in its Order of February 14, 1995, determined that Zahrans "are estopped from litigating the issue of the filing of the lien which was filed as part of Zahrans complaint before the state action was commenced by Cleary and adjudicated in the state court. The court however, ordered that all other issues may be presented to the jury in the present case." Zahrans abided by that order and did not pursue the lien claim.

Despite this law of the case that all claims other than those pertaining to the lien could be presented to the jury, Cleary brought its motion for sanctions alleging that Zahrans improperly prosecuted claims for negligent construction of a barn; deceptive practices; damages pursuant to Wisconsin statutes; and a claim for damages to the dairy herd.

The district court granted Cleary's motion for sanctions despite the fact that following Cleary's Motion to Dismiss, which was denied by Judge Evans, the parties had agreed to dismiss certain counts of the complaint, including the count pertaining to the fraudulent lien, without cost to either party.

Additionally, Rule 11(c)(3), states that the district court, "shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." In this case, while the district court described the conduct as having asserted that Cleary filed a fraudulent lien, the district court failed to show any conduct countering Zahrans' position that they abandoned that claim early in the litigation. Further, the district court did not explain the basis for imposing the sanction of "reasonable attorney fees. . . in the amount of $1,500." The district court did not have any factual basis for what would constitute misconduct by Zahrans in violation of Rule 11 to justify reasonable attorney fees under the

circumstances as there was no evidence presented as to the amount of time spent by Cleary in defending the claim of the fraudulent lien.

In this case, the district court should have granted Zahrans Motion for Sanctions against Cleary as Cleary sought sanctions on grounds which the district court had already ruled could proceed to the jury.

In its Motion for Sanctions, Cleary persisted in arguing that those claims were prosecuted despite the fact to the contrary. Cleary was in a position to know that as part of the law of the case, those arguments were allowed by Judge Evans to proceed to the jury as ordered on February 14, 1995. Cleary knew or should have known that the assertions that Zahrans should be subject to sanctions for proceeding with those claims lacked support in fact or existing law, and therefore should have been subject to sanctions by the district court.

**6. The Lower Courts violated Zahrans right to due process through improper admittance of evidence.**

Cleary confirmed the erection date of November 1, 1990 on September 24, 1990 and faxed it to Zahrans. There was no tentative date on that contract. It was a firm date followed up by the building drawings that the erection date was November 1, 1990. No changes of date was made to this contract, the tentative date appeared on the contract by a different hand writing only after the damages occurred due to the delay in the start up and the rising of Zahran's claims.

It is a well established law that written agreement is best evidence of what partners intended. *Universal Renaissance V. Allstate*, 16 F3d 125, As parole evidence is inadmissible to contradict written terms of unambiguous agreements, *Wigner v. Winger*, 82, F3d 140 (C.A. 7) and *Jones v. Shalala.*, 10 F3d 922 (C.A.7).

Cleary's introduction of evidence and the courts allowing testimony and interpretation of the actual agreement

between Zahrans and Cleary through Zimmerman testimony was a violation of the rule of evidence. Zimmerman, Cleary's main witness, was allowed to testify from a document that he did not know if it was authentic or not or when the tentative erection date inserted in it. His entire testimony therefore should not have been allowed because it was a hearsay evidence.

Under Rule (c) of Rule 803(24), hearsay cannot be admitted unless the general purpose of the rules of evidence and the interest of justice will best be served by the admission of the hearsay. Justice could not have been served by having Zimmerman testify from a document that he did not know who signed it, nor who wrote it, nor who inserted the most important words on, or the time such writings were made, nor should Zimmerman have been allowed to testify referencing the contract dispute since the accuracy of the information on the exhibits he testified from lacked proof of accuracy and in fact were fraudulent. F.R.C.P. 1006 28 U.S.C.A. *Emmell v. CocaCola Bottling Corp.*, 904 F Supp 723 and *Select Creations v. Paliafito America*, 852 F Supp 740.

Eliciting testimony from Zimmerman or Uecker on what that contract language meant was an abuse of discretion pursuant to Rule 801, as it is hearsay. *Heritage Homes of Attelboro v. Seeknok Water Dis.*, 648 F2d 761 763 (C.A.1, 1981). *United States v. Keane*, 552 F2d 534 558 (C.A. 7, 1975).

Worse yet, allowing the contract to be doctored by adding the "11/1//90" as a tentative erection date sometime after January 28,1991 and using it for Zimmerman and allowing him to testify is a clear abuse of discretion and a violation of Zahrans rights to due process and a violation of the Fourteenth Amendment clause of equal protection especially where the courts became aware of that fraudulent conduct.

**7. The Lower Courts deprived Zahrans of right to counsel by depriving Zahrans of their right to terminate their attorney upon observing he was deaf in one ear, and wasn't prepared for trial.**

Upon discovery that Attorney Bickley was hard of hearing and unprepared, Zahrans informed him and the court that they are better equipped to handle their own trial and will carry on the presentation of their case.

Zahran relayed to Judge Warren that Attorney Bickley was not carrying out his duties because he did not object to the introduction of Frankenmuth trial testimony which Judge Warren himself ordered that it only be used for impeachment and not as evidence. Zahrans requested from Attorney Bickley that he should object and bring to the attention of the court the defendants acts which were in violations of the rules committed by Cleary and their attorney. Such as concealing documents, and photographs throughout the discovery and Attorney Hannon's improper conduct of which Attorney Bickley refused. The pictures used at trail by Cleary were never produced to Zahrans.

The sixth amendment of the Constitution guarantees a person the right to counsel, either through an attorney or by presenting himself. *United States v. Santos a recent case determined by the Seventh Circuit, Turner v. American Bar, David Nowick v. Honorable Joan M. Ullsvik,* 69 F 3d 1320, *Rand V.C.F. Industries Inc.*, 797 F Supp 643, *Lane v. Richards,* 957 F 2d 363 (C.A.7) and *Stafford v. Mesnick,*63 F 3d 1445 (C.A. 1995.)

These appellants had the right for self-representation and the court erred in not allowing them to proceed which resulted in prejudice and depravation of their rights to due process requiring reversal because the right under the Sixth Amendment right to self-representation is not amenable to harmless error analysis. The right is either respected or denied

and its depravation cannot be harmless because among those basic fair trial rights as to which an error can never be treated as harmless is a defendant's right to an impartial adjudicator, whether by a judge or jury. *Gomez v. United States, 490 US 858, 104 L ED 2d 923, 109 S Ct. 2237.* Judge Clevert was not as he stated he was familiar with Frankenmuth's rulings.

## CONCLUSION

For the foregoing reasons, this Court should find that the Lower Courts violated Zahrans rights to due process and issued prejudicial rulings against Zahrans and to grant Zahrans petition for Writ of Certiorari or in the alternate demand the case for a new trial pursuant to the applicable laws which were violated by the Lower Courts.

Respectfully submitted,

Karen Zahran

Jan. 18-2000.

Robin Zahran

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CLEARY
BUILDING CORP. (608) 845-9700

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| | | |
|---|---|---|
| Purchaser Robin Zahran | Building Loc. | Denmark, WI |
| Address 718 Acorn Hill Farm | Tenant | Pat Finnel |
| Oakbrook, Ill 60515 | City | Denmark, WI |

Protector Roofing
Width 40 Length 133 Eave Height 15
Intended use of building Barn

Specifications: As per drawing enclosed
Cleary furnishes all labor on Same for 27 x 40 x 10, Same for 12'2" x 9.2 x 7
Farmer furnishes all lumber for 12'2" x 92.7 also 3 x 8 floor joice

| | |
|---|---|
| Contract amount | 73,000 |
| Down payment | 23,000 |
| Balance due | 25,000 |
| Balance due upon completion | 25,000 |

Dealer: Ralph Uecker
Purchaser: Robin Zahran
Date: Sept. 21, 990

This contract assigned to and accepted by Cleary Building Corporation this ___ day of _____, 19 __
Dealer: Ralph Uecker
Remarks:

BLDG. CORP. TEL N 608-845-7070 Jan. 6, 1991 11:23 No.
CLEARY
BUILDING CORP. (608) 845-9700

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| | | |
|---|---|---|
| Purchaser Robin Zahran | Building Loc. | Denmark, WI |
| Address 718 Acorn Hill Farm | Tenant | Pat Finnel |
| Oakbrook, Ill 60515 | City | Denmark, WI |

Protector Roofing
Width 40 Length 133 Eave Height 15
Intended use of building Barn

Specifications:

As per drawing enclosed
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|---|---|
| Contract amount | 73,000 |
| Down payment | 23,000 |
| Balance due | 25,000 |
| Truss payment | ----- |
| Balance due upon completion | 25,000 |

Dealer: Ralph Uecker
Purchaser: Robin Zahran
Date: Sept. 21, 1990

This contract assigned to and accepted by Cleary Building Corporation this ___ day of _____, 19 __
Dealer: Ralph Uecker
**Remarks: Nov. 1, 1990 erection date**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

---

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs,

v. Case No. 93-C-543

CLEARY BUILDING CORPORATION and
RALPH UECKER & SONS, INC.,
Defendants.

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ORDER

This is an action pursuant to the court's diversity jurisdiction for breach of contract, negligent construction, and fraudulent filing of lien by defendants Cleary Building corporation and Ralph Uecker & Sons, Inc. The defendants have filed a motion for summary judgment claiming that collateral estoppel precludes re-litigation of the claims.

A motion for summary judgment is properly granted only when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56 (c); Carston v. County of Cook, 952 F.2d 749, 751 (7th Cir. 1992). There is no genuine issue as to the following material facts in this case.

Plaintiffs Robin and Karen Zahran are residents of Oakbrook, Illinois. They own a dairy farm called Acorn Hill Farms in Denmark, Wisconsin.

Defendants Cleary Building Corporation and Ralph Uecker & Sons, Inc. are both Wisconsin corporations.

On July 8, 1990, a fire damaged several buildings at Acorn Hill Farms. At the time of the fire the Zahrans were

insured by Frankenmuth Insurance Company. On September 21, 1990, Robin Zahran entered into a contract with Ralph Uecker of Ralph Uecker & Sons, Inc. for construction of a structure known as a "Protector-Roof System and Lean" at Acorn Hill to replace damaged farm buildings. Ralph Uecker & Sons, Inc. assigned the contract to Cleary Building Corporation, subject to and limited by all terms, conditions, and provisions therein. The building of the structure was substantially completed by January 21, 1991.

During the construction, of course, the structure was exposed to the elements. The dairy herd was contaminated with mastitis, milk production decreased, and livestock was lost. The Zahrans allege that Cleary and Uecker breached the contract by not completing the building in a timely fashion, that they made misrepresentations concerning the contract, specifically regarding the scheduled erection date and time necessary for completion, and that the misrepresentations led to the damage referred to above.

Two previous lawsuits have arisen from these facts. In the first, Robin Zahran and Karen Zahran, proceeding pro-se, filed suit in the United States District Court for the Northern District of Illinois. An amended complaint in that suit named Frankenmuth Insurance Company and Cleary Building Corporation as defendants. The complaint contained the following allegations:

4. The Zahrans own and operate Acorn Hill Farms, a dairy farm near Denmark, Wisconsin.

5. Defendant, Frankenmuth Mutual Insurance Company is a mutual insurance company . . . which provided property and casualty coverage to the Zahrans for the property known as Acorn Hill Farms.

6. Defendant, Cleary Building Corporation is a Wisconsin corporation that contracted with the Zahrans to reconstruct a fire damaged barn . . .

. . . . .

13. On or about July 8, 1990, a fire damaged and destroyed certain items and buildings on the plaintiff's property insured by the policy, as follows:

a.) Farm personal property was damaged.

b.) A two story barn (Unit 151 was damaged.

. . . .

g.) Clean up of debris was required.

. . . .

23. Throughout all time periods relevant hereto, the Zahrans repeatedly informed Frankenmuth that monies were needed immediately to enable the buildings to be reconstructed prior to the onset of winter otherwise they would suffer severe damages, including but not limited to the loss of livestock . . . .

33. In an attempt to mitigate damages and prevent injury to or loss of livestock . . ., Plaintiffs contracted with defendant, Cleary building Corporation on or about September 21, 1990, to reconstruct the . . . fire damaged barns . . . prior to the onset of winter.

34. Pursuant to the contract, Cleary was to furnish the Zahrans with a . . . barn, model "Protector Roof System with Lean," (as per drawings).

79. . . . . Plaintiffs had demolished portions of the older building based on the representations of Cleary Building that they would begin work on November 1, 1990.

80. As a result of the demolition, a large portion of plaintiffs' barn and milking operations were left open to the elements.

81. On or about December 3, 1990, Denmark, Wisconsin was hit by severe weather conditions, resulting in [a] 12-14 inch snow fall.

82. As a result . . ., plaintiffs sustained severe damages, including, but not limited to loss of livestock . . .

The Illinois case was transferred to this district, where it became case number 91-C-808. On May 28, 1992, the Honorable Thomas J. Curran ordered that the amended complaint in the case by dismissed as to Cleary because the company was not served within 120 days of the filing of the amended summons and complaint. Litigation continued against Frankenmuth Insurance Company.

On April 26, 1993, the case went to trial. Testimony was elicited regarding dying livestock, lost milk production, revocation of milk sales permits, suspended milk sales, mastitis infections, and increased veterinary bills. However, they jury was unable to reach a verdict, and Judge Curran declared a mistrial.

The case was retried beginning May 10, 1993. At the second trial, similar testimony was presented regarding lost milk production, lost livestock, mastitis, and increased veterinary bills. The Zahrans proceeded without counsel at both trials.

On May 18, 1993, the jury reached a verdict in favor of Frankenmuth Insurance Company and against the Zahrans. The pertinent finding on the verdict was as follows:

> Are the Zahrans entitled to recover against Frankenmuth on their breach of contract claim as a result of the fire of July 8, 1990? Answer: No.

A final judgment was entered against the Zahrans. On July 22, 1993, the Zahrans appealed.

The second lawsuit relevant to this motion arose out of a lien Cleary filed for work performed at Acorn Hill Farms. The line was filed on April 14, 1991. Cleary filed an action in the circuit court for Manitowoc County to enforce the lien.

In their answer the Zahrans alleged:

> 3. As to the allegations of paragraph 5, deny that the plaintiff [Cleary Building Corporation] performed work, labor and services pursuant to the terms of the alleged written contract dated September 21, 1990, or any modifications or changes hereto, and allege that said contract was breached by the plaintiff in numerous material respects, and said building has not been completed, and has not been constructed as specified and agreed between the parties . . .
>
> 6. As to the allegations of paragraph 8, state that they have insufficient information to form a belief as to the allegation regarding the last date that work, labor or services were performed as alleged and deny allegations that the work required under the aforesaid contract was completed in an workmanlike manner according to standard practices, and allege that the work was not done in a workmanlike manner, was not done according to the plans and specifications agreed upon and according to standard practices and that the building constructed by the plaintiff is deficient in many respects and does not conform to the terms of

> said contract and the practices and standards prevalent in the industry.
>
> 9. As to the allegations of paragraph 12, deny that there is now due and owing to plaintiff form these answering defendants the sum of $37,523.50 . . . or any other amount.

In the Manitowoc County case the parties stipulated to submit the matter to an arbitrator to determine whether there were any construction deficiencies, corrections necessary, and ultimately to settle an escrow account to be created by Robin Zahran and Karen Zahran in the amount of $25,000. On February 18, 1993, arbitrator Keith D. Otto, P.E., issued a report based upon final inspection performed February 12, 1993. He stated that Cleary had complied with all directives of the arbitration and that the $25,000 escrow check should be paid to Cleary Building Corporation. On March 18, 1993, the Honorable Fred H. Hazelwood issued findings of fact and a final judgment pursuant to the stipulation between the parties and the arbitrator's findings. The case was dismissed with prejudice.

On May 28, 1993, the Zahran's, again proceeding pro-se, filed the present case against Cleary and Uecker. Their complaint is divided into four counts. One is for breach of contact in which the claim is that the barn was not constructed within the time specified. On this claim they seek consequential damages for the deaths of animals, loss of milk production, and disease to the herd. The second count is for deceptive practices, consumer fraud, and breach of the implied duty of good faith and fair dealing. This claim is based on the alleged failure to complete the barn on time and an allegedly fraudulent lien on the property. The third count is called a claim for damages pursuant to Wisconsin statues. No statute is cited, however. Again the basis for the claim is the delay in the construction. Finally, count four is for negligence and

misrepresentation, again based on the failure to complete the work in a timely fashion. It would appear, then, that, in general, the issues are whether the work was completed in a timely manner constituted a breach of the contract, negligence, misrepresentation, etc.; whether the claimed damages were a result of the actions of Uecker or Cleary; and whether the line was fraudulently filed.

The Zahrans obtained counsel, and an appearance on their behalf was entered on November 19, 1993, by attorney Douglas K. Morrison.

The question raised by the defendants' summary judgment motion is whether plaintiffs are barred form litigating these issues under the doctrine of collateral estoppel.

Collateral estoppel is a judge-made doctrine designed both to protect litigants from having to litigate issues already decided. The doctrine, of course, promotes judicial economy. Parklane Hosiery co. v. Shore, 439 U.S. 322 (1979). For the doctrine to apply, four elements must be met:

> 1) the issue sought to be precluded must be the same as that involved in the prior litigation, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action.

LaPreferida, Inc. v. Cerceceria Modelo, S.A. de C.V., 914 F.2d 900, 906 (7th Cir. 1990).

This case involves a prior federal judgment and a prior state judgment. Pursuant to 28 U.S.C. § 1738, a federal court must give a state court judgment the same preclusive effect s it would be given under the law in which the judgment was rendered. Migra v. Warren City Sch. Dist Bd. of Education, 465 U.S. 75 (1984).

The state court judgment in this case presents, I believe, an easier question that the federal judgment as to whether

collateral estoppel should apply. Cleary brought the state case enforce its lien. An arbitrator was appointed and Cleary was required to make certain repairs on the property. According to the arbitrator's report, Cleary either made those repairs or was prevented from making them by Robin Zahran. The arbitration decision was that as of that time, "Cleary has provided an acceptable structure." Cleary was awarded the $25,000 which the Zahrans had deposited in an escrow account. Final judgment was entered in state court on the basis of the report.

Collateral estoppel applies to the issue of the validity of the lien. The entire case in state court was predicated on the legality of the lien; therefore, a determination that the lien was valid was essential to the final judgment. The Zahrans were parties to the lawsuit. It is fair that they be precluded from re-litigating the issue of the validity of the lien.

I find, however, that the Zahrans are not precluded from litigating the other issues, which involve whether Cleary and Uecker failed to complete the construction on time and are responsible for any damages the Zahrans may have suffered. I so find despite the fact that in the previous federal case the Zahrans were parties. Also, it is true that the issue litigated in the previous case involved the delay in the construction of the barn and the harm caused to the Zahrans. However, the issue passed on by the jury was whether Frankenmuth Insurance Company breached the insurance contract (and by implication was responsible for the delay in construction). Frankenmuth was the Zahran's insurer, not Cleary's or Uecker's. That Frankenmuth was not responsible has very little to do with whether the defendants here <u>are</u> responsible. Quite naturally, in the case against Frankenmuth, the Zahrans were attempting to place the blame on their insurer and were not trying to lay the blame at the feet of the contractors.

Of course, the primary claim that Cleary and Uecker make in the present motion is that the Zahrans are precluded

from establishing any damage to the herd as a result of the delay in construction. During the first trail in the Frankenmuth case, after the close of the plaintiffs' case, Judge Curran awarded judgment to Frankenmuth pursuant to rule 50 of the Federal rules of Civil Procedure on the issue of damages to the dairy herd. He found "no legally sufficient evidentiary basis for a reasonable jury to find for [plaintiffs] on that issue." Whether collateral estoppel should apply to this finding is a close question. However, a rule 50 dismissal is dependent on the evidence which was presented in a particular case ant the way the judge perceived that evidence. It is not a finding that there were no damages. I will not apply collateral estoppel to this finding.

Not to apply collateral estoppel to the issue of damage to the herd does not violate the principles on which the doctrine of collateral estoppel is based. The first principle, as I stated above, is to protect parties form having to re-litigate an issue in multiple forums. Cleary and Uecker were not parties in the previous lawsuit and therefore have not previously litigated this issue. They are not, therefore, being required to re-litigate the issue. There has been no finding that they did not breach their contract with the Zahrans.

The second principle underlying the doctrine of collateral estoppel is judicial economy. While that principle may not seem to be served by having a trail in the present case, the Zahrans are only partly responsible for the situation. They named Cleary (who seems to be the primary defendant here) in the suit before Judge Curran. However, they failed to serve Cleary within the 120-day period allowed under the rules. The Zahrans were not granted an extension of time in which to obtain service. Rather Judge Curran dismissed Cleary without prejudice, thus pretty much ensuring another lawsuit.

To summarize, the Zahrans are estopped from re-litigating the issue of the filing of the lien. However, all other issues may be presented to the jury in the present case.

I will note that the Zahrans had also filed a motion for summary judgment. Their motion has been withdrawn.

On final matter. Cleary has filed a motion to preclude that Zahrans from designating expert witnesses to be called at trial. As ground for its motion, Cleary notes that as of December 23, 1994, the Zahrans had not disclosed any expert witnesses that they intended to have testify at trial. According to local rule 7.07(d) (2), such witnesses must be disclosed at least 90 days before trial. Since the trial in this case is currently scheduled for February 28, 1995 (more on that later), less than 90 days after December 23, 1994, the defendants have asked me to order that the plaintiffs are precluded from designating expert witnesses at trial.

In response to Cleary's motion, the Zahrans stated that they have not retained any experts who fall within the purview of Federal Rule of Civil Procedure 26 (a) (2) (B) and the reporting requirement of local rule 7.07 (d). The Zahrans note that they expect two veterinarians to testify and provide opinions during the trial. However, each of these veterinarians was involved in treatment of the plaintiffs' dairy herd before, during, and after the herd's illness, and therefore they are occurrence witnesses.

I will not at this time preclude the Zahrans from calling the witnesses in question. The motion is denied.

IT IS THEREFORE ORDERED that the motion of the defendants for summary judgment is GRANTED IN PART and DENIED IN PART as indicated herein.

IT IS FURTHER ORDRED that the plaintiffs' motion for summary judgment is WITHDRAWN.

IT IS FURTHER ORDERED that the motion to preclude expert testimony is DENIED. Which brings me to the

trial date. Whether the trial will proceed as scheduled on February 28, 1995, is questionable in light of a recent move of a severed criminal case to February 27. To discuss the situation, I will have a conference call with the attorneys on February 22, 1995, at 8:45 a.m.

Dated at Milwaukee, Wisconsin, this 14th day of February, 1995.

BY THE COURT:

_____

TERRENCE T. EVANS
CHIEF JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

| | |
|---|---|
| ROBIN ZAHRAN and | ) |
| KAREN ZAHRAN, | ) |
| Plaintiffs-Appellants, | ) |
| v. | ) |
| | ) |
| CLEARY BUILDING CORP., | )No. 93 -C -0543 |
| RALPH UECKER AND SONS, | ) |
| INC. | ) |
| Defendants. | ) |

**AFFIDAVIT OF JOHN H. BICKLEY, JR.**

NOW COMES JOHN H. BICKLEY JR., former Attorney for Robin Zahran in the above entitled cause and being first, duly sworn, and upon his oath does allege and states as follows:

1. Affiant was the trial attorney for the Plaintiffs in the above entitled cause and as such was charged with the responsibility of presenting the case in chief for the Plaintiffs before this Honorable Court and Jury.

2. The prime and salient issue raised by the Plaintiff in his case in chief centered upon the fact that he was informed that erection work would commence on his barn on November 1, 19990.

3. Exhibit 3 of the Plaintiffs case was a pink initial contract in the handwriting of Mr. Uecker which had a blank space in the lower left corner under the item printed as

"Remarks". the space also on the lower right had side set for t as "Tentative Erection Date" likewise was blank.

4. The Court's attention is directed to the evidence and testimony of both Mr. Zahran and Mr. Uecker that Mr. Zahran has insisted that an erection date had to be placed upon the contract of the parties before he would agree to let the contract to Cleary Building Corporation. Mr. Uecker stated he had no independent authority to insert such a date but was required first to obtain such a date from the office of Cleary Building Corporation.

5. Mr. Uecker also testified that Cleary had a 6 week backlog and that the work could be accomplished with a 2 to 3 week period of time after commencement of the work.

6. The initial contract was signed September 21, 1990 and a revised contract was faxed to Mr. Zahran on September 24, 1990 which had inserted into it an erection date of November 1, 1990. It is important to note on the document attached hereto and marked Exhibit "A" to this Affidavit that there is no entry in the space marked "Tentative Erection Date" nor under the word "Remarks".

7. Exhibit B was Plaintiffs Exhibit #4 and 4 "A" in the trial and this document was faxed back tot he Plaintiff on September 24, 1990 showing the sale to be out of the Appelton Office of Clearing Building Corporation this time however unlike Plaintiffs' Trial Exhibit "3" this Exhibit had "November 1, 1990 erection date" inserted under the work "Remarks". This is Exhibit B attached hereto.

8. On January 28, 1991 - Mr. Zahran after the contention commenced between the parties hereto, phoned

Cleary Building corporation and requested them to fax to him the revised copy of the contract existing between the parties showing the date to commence erection. Exhibit 3 attached hereto was faxed back to him on January 28, 1991 which Cleary shows that there is no entry in the spaced called "Tentative Erection Date". The Cleary Building Corporation fax number is clearly set forth on the top of this instrument. This document is Exhibit "C" attached.

9. Exhibit "D" attached was a copy of a document which was utilized by Attorney Hadden on his direct examination of Mr. Zimmerman, who frankly admitted he had not entered upon the facts of this case until March or April of 1991.

10. The Court's attention is invited to the lower right hand corner where someone has patently doctored the inserted a tentative erection date of November 1, 1990 (11-1-90). This addendum had to have been inserted after January 28, 1991 and after the Plaintiff had executed the contract. It was used in this Trial by Mr. Hadden to have Mr. Zimmerman explain to the jury that the purpose for the date placed in the "Tentative Erection Date" space was to indicate to the customer that the erection date really meant "on or about" or even "three weeks later".

11. The alteration of this instrument, obviously be someone connected to the Defendant Cleary Building corporation and utilized on the trial, had to have been done for the purpose of obstructing justice or to suborn perjury. This insertion into the instrument was not noticed by affiant until just after the case went to the jury.

12. It was at that time Mr. Wood approached the evidence table (where all the Exhibits rested) and as counsel

were going through the Exhibits to be sent back to the jury room, he was seen and questioned by affiant as to why he was removing an exhibit from the pile which was then identified as a copy of Exhibit 4 or 4A. I requested of Mr. Wood the right to see the document he had removed and he refused to show it to me. We had an argument for about five minutes as to why he removed it from the pile and I wanted to see what he had removed. After five minutes counsel for Mr. Uecker advanced to me and said I could have a clear copy of the document in his possession but specifically pointed out that the had not solicited testimony from his client (Uecker) as to a "Tentative Erection Date". The importance of this statement at the time was lost on affiant until the Jury returned its response to Special Interrogatory #1 which stated:

> "Did Plaintiffs and Defendants agree that repair work on the fire-damaged barn complex on the Zahran farm would commence on November 1, 1990."
>
> To which they answered "No".

13. This response prompted affiant to review copies of the documents submitted during the trial. I have not examined the Exhibits in the possession of the Court, but if a copy of the contract that went to the Jury contains a "Tentative Erection Date of 11-1-90" that that document is obviously fraudulent and the Jury was misled as to the true and correct contract existing between the parties, since Mr. Zimmerman was advised on May 30, 1991 that the contract had been altered (See Exhibit "E" attached) and this Plaintiff did not receive a fair trial and his Motion for a New Trial should be granted as the verdict was obtained based on tainted evidence.

14. Plaintiffs do not know who "doctored" the contract, except that it was utilized by the defense to indicate to

the Jury that no specific date of erection was clearly understood between the parties. This of course was not so and Exhibits A B & C support Plaintiffs contention. Only Exhibit "D" , the fraudulent document, supports the defense position of Cleary Building Corporation.

15. With respect to the photographs depicting scenes of debris and scenes of the premises of the Plaintiffs' farm, affiant queried both defense counsel as to then these photographs had been supplied to the Plaintiffs and a affiant was informed that they had been supplied before the discovery cut off date or two years before to Mr. Morrison, former attorney of the Plaintiffs.

16. Acting on the representation the photos were offered as a group Exhibit which were utilized extensively by both Defendants in the presentation of evidence and the final arguments. It now appears that no such production actually took place and the photos should have been barred. Attached is an affidavit by Attorney Morrison who specifically states that no such tender was made to him, and Affiant states that the first tender made to him was in the court room. Denial of these photos in the normal discovery process, was extremely prejudicial to Plaintiffs' case since no inquiry had ever been made about them.

17. That for the above reasons affiant believes that this Court should make inquiry as to obvious fraudulent conduct to determine (a) what actual documents went to the Jury; (b) when the photos were previously produced and by whom; and (c) who altered the contract between the parties after January 28, 1991 to mislead the Triers of the facts which was highly prejudicial to the Plaintiffs herein.

Respectfully submitted,

John H. Bickley Jr.
Trial Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs,

v. Case No. 93-C-543

CLEARY BUILDING CORPORATION and
RALPH UECKER & SONS, INC.,
Defendants.

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Stamped Sept. 30, 1997

**ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, A DELCARATION OF MISTRIAL OR IN THE ALTERNATIVE A NEW TRAIL (DOC. #136)**

Before the court is the plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative a Declaration of a Mistrial or in the Alternate a New Trial (Doc. #136). The plaintiffs assert a myriad of reasons why the juries' verdict for the defendants was wrong, ranging from improper discovery procedures to Judge Warren's incapacitation midway through trial. For the reasons set forth herein, the motion is denied.

The plaintiff's motion for judgment notwithstanding the verdict is procedurally flawed. The plaintiffs failed to move for judgment as a matter of law at the close of evidence and prior to the time the case went to the jury. Under Rule 50(a), moving for judgment as a matter of law prior to submission of the case to the jury is a procedural prerequisite to filing a "renewed"

motion for judgment as a matter of law under Rule 50(b). Umpleby v. Potter & Brumfield, Inc., 69 F.3d 209, 212 (7th Cir. 1995) (recoginzing that plain language of Rule 50(b) precludes judgment as a matter of law when the party fails to make the motion at the close of evidence.)

Even assuming the plaintiffs had moved for judgment as a matter of law at the close of evidence, the motion must still be denied. A motion challenging the sufficiency of the evidence should be denied unless "the court is satisfied that, considering all credible evidence and reasonable inferences therefore in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain" the verdict. Sokol Crystal Products v. DSC Communications, 15 F.3d 1427 (7th Cir. 1994). That is clearly not the case here. Ample evidence in the record supports the verdict.

The motion for a new trial or for a mistrial, more properly characterized as a motion to alter or amend judgment under Rule 59(e), is also without merit. A motion for new trial may be granted when the jury's verdict is against the weight of the evidence. Sokol, 15 F.3d at 1432. However, granting of such a motion is premised upon an inflammatory and prejudicial error, Hardware Mut. Cas. Co., 272 F.2d 614 (7th Cir. 1959), and is condition on the moving party making timely objection to the prejudicial error. Gonzalez v. Volvo of America Corp., 752 F.2d 295 (7th Cir. 1985). Timely objections were not made during trial to the alleged errors. Furthermore, as already noted, the verdict was not against the weight of the evidence or unduly prejudicial. Therefore, the plaintiffs' motion for a new trial must fail.

Furthermore, the plaintiffs have not satisfied the requirements for altering or amending a judgment under Rule 59(e). A court may grant a Rule 59(e) motion if the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record

that clearly establishes a manifest error of law nor fact. Russell v. Delco Remy Div. of General Motors, 51 F.3d 746, 749 (7th Cir. 1995). The Zahrans have done neither.

Alternatively, the motion may be construed as a motion for relief from judgment under Rule 60. Under Rule 60(b), the court may relieve a party from a judgment for the following reasons: 1) mistake, inadvertence, surprise o excusable neglect; 2) newly discovered evidence; 3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct or an adverse party; 4) the judgment is void; 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or 6) any other reason justifying the relief from the operation of the judgment.

Probably the only potential ground for relief for the plaintiffs under Rule 60(b) would be under subsection (3). The plaintiffs' claim that Attorney Wood prevented an exhibit from going to the jury may arguably fall under the category of a fraud/misconduct of an adverse party. However, the Zahrans failed to proffer sufficient proof to substantiate this claim.

IT IS ORDERED that the plaintiffs' Motion for Judgment Notwithstanding the Verdict or In the Alternative a Declaration of a Mistrial or in the Alternative a New Trial (Doc. #136) is denied.

Dated at Milwaukee, Wisconsin, this 30th day of September, 1997.

BY THE COURT

C.N. CLEVERT
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs,

v. Case No. 93-C-543

CLEARY BUILDING CORPORATION and
RALPH UECKER & SONS, INC.,
Defendants.

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Stamped March 30, 1998

**ORDER GRANTING CLEARY BUILDING CORP,'S MOTION FOR SANCTIONS (DOC. #127) AND DENYING THE PLAINTIFFS' MOTIONS FOR SANCTIONS AGAINST DEFENDANTS FOR BRINGING A FRIVOLOUS RULE 11 SANCTIONS (DOC. #156)**

Before the court is Cleary Building Corp.'s Motion for Sanctions (Doc. #127) and the plaintiff's Motion for Sanctions against Defendants for Bringing a Frivolous Rule 11 Sanctions (Doc. #156). For the reasons set forth herein, Cleary Building Corp.'s Motion for Sanctions is granted and the plaintiffs' Motion for Sanctions is denied.

Cleary requests sanctions against plaintiffs and plaintiffs' counsel in an amount equal to all defense costs incurred in this matter. Cleary asserts that sanctions are appropriate because the plaintiffs filed and prosecuted the following claims:

a) a claim that Cleary filed a fraudulent lien, which claim was known or should have been known to lack of support

in fact or law, as such claim had been the subject of a judgment rendered pursuant to binding arbitration in Manitowoc County.

b) a claim for negligent construction of a barn, which claim was known or should have been known to lack support in fact or in the existing law, as frivolous since the plaintiff's claims survived summary judgment, and that Attorney Wood engaged in misconduct by removing an exhibit during trial.

Fed. R. Civ.. P. 11(b) provides:

**Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances, - - -

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery' and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The standard for imposing sanctions under Rule 11 is an objective determination of whether a sanctioned party's conduct was reasonable under the circumstances.

The court concludes that the plaintiffs engaged in conduct with violated rule 11. The court cannot conclude that a reasonable person, after due investigation of the facts and law, would have asserted that Cleary Building filed a fraudulent lien against the plaintiff's property with respect to work done under its September 21, 1990, contract with Robin Zahran. At the very least, this claim was asserted to harass Cleary Building and cause delay. Furthermore, this claim was not warranted by existing law or a good faith argument for its modification. On the other hand, the plaintiffs have proved no sanctionable conduct on the part of the defendants. Hence, the plaintiffs' motion for sanctions will be denied. Therefore,

IT IS ORDERED that the Cleary Building Corp.'s Motion for Sanctions (Doc. #127) is granted.

IT IS ORDERED that the plaintiffs are assessed reasonable attorney fees payable to Cleary Building Corporation in the amount of $1,500.

IT IS FURTHER ORDERED that the plaintiff's Motion for Sanctions against Defendants for Bringing a Frivolous Rule 11 Sanctions (Doc. #156) is denied.

Dated at Milwaukee, Wisconsin, this 30th day of march, 1998.

BY THE COURT

C.N. CLEVERT
U.S. District Judge

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
September 17, 1998
Before
Hon. **William J. Bauer**, Circuit Judge
Hon. **Joel M. Flaum**, Circuit Judge
Hon. **Michael S. Kanne**, Circuit Judge

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| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No.97-1712 v. FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee | )<br>)Appeal from the United<br>)States District Court for<br>)the Eastern District of<br>)Wisconsin<br>) No. 90 C 337<br>) Thomas J. Curran,<br>) Judge |

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|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, No. 98-1905 v. FRANKENMUTH MUTUAL INSURANCE COMPANY, THOMAS H. KOCOUREK, sheriff of Manitowoc County, Wisconsin and his agents and representatives and the Corporation of Manitowoc County, Wisconsin, ROBERT ZEITNER, et al., Defendants-Appellee | )<br>)Appeal from the United<br>)States District Court for<br>)The Northern District<br>)for Illinois, Eastern<br>)Division<br>)<br>)<br>) No. 97 C 978<br>)<br>)<br>)Harry D. Leinenweber,<br>) Judge<br>)<br>)<br>) |

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## ORDER

The following are before the court:

1. District court's order of February 14, 1997, granting defendant's motion for issuance of a writ of execution case No. 97-1712.

2. Plaintiffs-appellants' jurisdictional memorandum in support of their position that appeal No. 97-1712 should not be dismissed, filed on April 24, 1997, by plaintiffs-appellants pro-se.

3. Plaintiffs-appellants' opening brief in appeal No. 98-1905, filed on August 7, 1998, by counsel for plaintiffs-appellants.

4. Plaintiffs-appellants' motion to consolidate appeals No. 97-1712 and No. 98-1905, filed on April 27, 1998, by plaintiffs-appellants pro-se.

5. Response in opposition to the motion to consolidate, filed on May 6, 1998, by counsel for defendant-Appellee Frankenmuth Mutual Insurance Co.

6. Response in opposition to the motion to consolidate, filed on May 8, 1998, by counsel for defendant-Appellee Thomas Kocourek.

7. Reply to the response in opposition, filed on May 13, 1998, by plaintiffs-appellants pro-se.

8. Motion for summary affirmance in appeal No. 98-1905,filed on August 25, 1998, by counsel for defendant-Appellee Frankenmuth Mutual Insurance Co.

9. Motion for summary affirmance in appeal No. 98-1905, filed on September 15, 1998, by counsel for defendants Steven L. Popuch Robert Zeitner and the Law Offices of Swift, Popuch & Sinclair.

## I. BACKROUND

### A. Prior Litigation

Following a 1989 storm that damaged their Wisconsin farm property, Robin and Karen Zahran filed a diversity action against their insurance company, Frankenmuth Mutual Insurance co. ("Frankenmuth"), seeking damages and costs of $537,000, plus interest and attorneys' fees. The Zahrans' claim was docketed on January 19, 1990, as cause No. 90 C 337 in the United States District court for the Eastern District of Wisconsin. They alleged bad faith and breach of contract by Frankenmuth for its refusal to pay for all of the damages claimed under their policy. Frankenmuth counter sued to recover $182,888 it had already paid out, alleging that the policy was void because of the Zahran's fraud, concealment, and material misrepresentation regarding the claim.

The district court dismissed without prejudice Frankenmuth's counterclaim because the insurance company had failed to submit the separate jury instructions and special interrogatories that the court had requested. At trial, however, the jury returned a special verdict that Frankenmuth was not obligated to pay because the Zahran's had indeed committed fraud in submitting their insurance claim. The Zahrans appealed the jury's decision (appeal No. 92-1778), and Frankenmuth cross-appealed the district court's dismissal of their counterclaim (appeal No. 92-1848). On March 28, 1994, this Court affirmed the jury's verdict for Frankenmuth but reversed the district court's dismissal of Frankenmuth's counterclaim, remanding the case with instructions to enter judgement in favour of Frankenmuth. *See Zahran v. Frankenmuth Mutual Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994) ("*Zahran I*") (unpublished disposition). Pursuant thereto, the district court entered judgement in case No. 90 C 337 on June 29, 1994.

Upon remand, the Zahrans filed motions for relief, which were denied on July 18, 1994. *See* Fed. R. Civ. P. 60(b). Karen Zahran appealed the denial of their rule 60(b) motion,

docketed as appeal No. 95-2588 ("*Zahran III(a)*"), but on April 22, 1997, this Court concluded that all of the issues raised had been considered previously. Consequently, the decision of the district court was summarily affirmed. While this Court concluded that the appeal was frivolous, it declined to impose Rule 38 sanctions. *See Zahran v. Frankenmuth Mutual Ins. Co.*, Nos. 95-2588 & 96-2270, 1997 WL 205381, at *2-4 (7th Cir. Apr. 22, 1997) ("Zahran III (a) & (b)") (unpublished disposition); *see also* Fed. R. App. P. 38; Fed. R. Civ. P. 60(b).

During the pendency of cause No. 90 C 337 in the district court, two fires broke out at the Zahran's Wisconsin property: one in March 1990, and the other in July 1990. Frankenmuth paid for a portion of the losses claimed, but because it did not pay the entire amount, the Zahrans brought a second suit against Frankenmuth alleging bad faith and breach of contract. The claim was docketed in the United States District Court for the Eastern District of Wisconsin as cause No. 91 C 808. At trial, the jury returned a special verdict in favour of Frankenmuth on the Zahrans' bad faith claim, but deadlocked on the questions of breach of contract. Judge Curran declared a mistrial; at the second trail the jury found for Frankenmuth on the Zahrans' breach of contract claim. The Zahrans appealed but this court affirmed on April 25, 1995. *See Zahran v. Frankenmuth Mutual Ins. Co.*, No. 93-2852, 1995 WL 241392 (7th Cir. Apr. 25, 1995) *("Zahran II")* (unpublished disposition).

On August 9, 1994, approximately one month after Judge Curran denied their Rule 60 (b) motion for relief from judgement in case No. 90 C 337, the Zahrans filed a seven-count complaint, docketed in the Northern District of Illinois as cause No. 94 C 4827. This claim also arose out of the tornado and fire damage to the Zahrans' Wisconsin farm during 1989 and 1990. In addition to Frankenmuth, the Zahrans named as defendants: two Frankenmuth claims adjusters; two independent

claims adjustment firms, General Adjusting Bureau ("GAB") and Crawford and Company ("Crawford"), that had been engaged by Frankenmuth to review the Zahrans' claims; a GAB claims adjuster; a building contractor hired by the GAB claims adjuster to inspect the Zahran's property; a Crawford claims adjuster who inspected the Zahrans' property; the law firm engaged by Frankenmuth to represent it in their counterclaim against the Zahrans; two attorneys with that firm; and the Manitowoc County sheriff.

The complaint alleged breach of fiduciary duty, conspiracy to defraud the Zahrans of their property, racketeering, slander, libel, interference with contractual relations, violations of the Fair Credit Reporting Act, *see* 15 U.S.C. § 1681 *et seq.*, and loss of credit rating. *See Zahran v. Frankenmuth Mutual Ins. Co.*, No. 94 C 4827, 1995 WL 535088, at *1-2 (N.D. Ill. Dept. 5, 1995). The district court concluded that jurisdictional infirmities and principles of *res judicata* and collateral estoppel barred the Zahrans from litigating and re-litigating the issues raised in their complaint, and therefore dismissed the claims. *See id.* at *3-6; *see also Zahran v. Frankenmuth Mutual Ins. Co.*, No. 94 C 4827, 1996 WL 182563 (N.D. Ill. Apr. 15, 1996) (unpublished disposition). In addition, Judge Grady imposed rule 11 sanctions against the Zahrans for attorneys' fees, costs, and expenses incurred in the defense of the case (to date, it would appear that the sanctions remain unpaid). Judge Grady also ordered the Zahrans "not to initiate any further action, arising out of or relating to the May 1989 windstorm on March 1990 fire losses." *Zahran v. Frankenmuth Mutual Ins. Co.*, No. 94 C 4827, 1997 WL 53107, at *3(N.D. Ill. Feb. 6, 1997) (unpublished disposition).

The Zahrans' appeal from Judge Grady's dismissal of their complaint, docketed in this Court as appeal No. 96-2270 ("*Zahran III (b)*"), was consolidated for disposition with *Zahran III (a)*, Karen Zahran's appeal from Judge Curran's

denial of their Rule 60 (b) motion in cause No. 90 C 337. The decisions of the respective district courts were affirmed by this Court in an unpublished disposition on April 22, 1997. *See Zahran III (a) & (b)* , 1997 WL 205381, at *2-4.

**B. The Instant Litigation**

**1. Cause No. 90 C 337: Zahran IV**

While Karen Zahran was appealing *Zahran III (a)*, Frankenmuth registered the June 29, 1994 , judgement in the Northern District of Illinois (the Zahrans reside in Oak Brook, Illinois). *See* 28 U.S.C. § 1963. Frankenmuth was able to garnish $3,408.83 from a bank account in partial satisfaction of the judgement. Frankenmuth next filed a rule 69(a) motion for a writ of execution in the United States District Court for the Eastern District of Wisconsin, where the judgement was rendered and where the Zahrans' dairy farm is located. *See* Fed. R. Civ. P. 69(a). The total sought as of December 6, 1996, the date on which the motion was filed, was: $182,888.37 for the judgement itself (not including the offset for the garnishment); $25,519.53 in interest from the June 29, 1994, entry of judgement until November 1996; [1] and $1,637.50 in costs taxed against plaintiffs.

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1 Under Wisconsin law, which applied in this diversity action, *see Kuehn v. Childrens hospital*, 119 F. 3d 1296, 1300-01 (7th Cir. 1997); *First Bank Southeast, N.A. v. Predco, Inc.*, 951 F 2d 842, 846 in. 2 (7th Cir. 1992); *Hunker v. Royal Indemnity Co.*, 204 N.W. 2d 897, 901-04 (Wis. 1973), a writ for the execution of a money judgement permits the judgement creditor to obtain interest on the judgement, which accrues at the rate of 12% per year on the amount recovered, from the date of entry until the judgement is paid. *See* Wis. Stat. § 815.05(8) (West 1998); *Burlington Northern R.R. Co. v. City of Superior*, 464 N.W. 2d 643 (Wis. 1991).

Judge Curran granted Frankenmuth's Rule 69(a) motion on February 14, 1997, but on March 24, 1997, the court received a letter from the Zahrans which is construed as a motion for an extension of time to file a notice of appeal. The district court granted the extension, *see* Fed. R. App. P. 4(a); Fed. R. Civ. P. 77(d), and on March 28, 1997, the Zahrans once again appealed. The action was docketed by this Court as appeal No. 97-1712 *("Zahran IV")*. On April 14, 1997, this Court called for jurisdictional statements explaining why they appeal should not be dismissed, and suspended briefing pending resolution of the question.

On April 4, 1997, the Manitowoc County Sheriff's Office received the writ of execution granted by Judge Curran; Frankenmuth thereafter entered a lien against Zahrans' property. *See* Wis. Stat. §§ 815.05, 815.195. The Zahrans filed an emergency motion for a stay pending appeal, which was denied by this Court on May 23, 1998. The Zahrans then satisfied the judgement prior to the sheriff's sale: a notarized "Satisfaction of Judgement" contained in the record of appeal No. 98-1905 declares that the judgement was "fully paid and satisfied" and discharged on May 29, 1997.

**2. Cause No. 97 C 978: Zahran V**

On February 12 1997, less than a week after Judge Grady entered sanctions against the Zahrans in what was to become *Zahran III(b)*, the Zahrans filed yet another complaint in the United States District Court for the Northern District of Illinois, docketed as cause No. 97 C 9789. Named as defendants in the action were Frankenmuth; the law firm engaged by Frankenmuth in its efforts to execute the judgement entered pursuant to *Zahran I;* two attorneys who worked for the firm; the Manitowoc County sheriff and his agents; and Manitowoc County and its agents. Count one of the complaint alleged abuse of process by all defendants in Frankenmuth's efforts to obtain the writ of execution; count two alleged

violations of the Fair Debt Collection Practices Act ("Act"), 15 U.S.C. § 1692 *et seq.*, by Frankenmuth, its law firm, and its attorneys in attempting to execute the judgement.

On August 11, 1997, Judge Leinenweber dismissed the complaint against Frankenmuth, its law firm, and its attorneys; and on March 11, 1998, the court granted the remaining defendants' motions for summary judgement on court two of the complaint, dismissed count one of the complaint against the remaining defendants for lack of jurisdiction under the *Rooker-Feldman* doctrine, and granted Frankenmuth's motion for Rule 11 sanctions. The court also entered an order requiring the Zahrans to seek permission to file any new claims against these same defendants. *See* Fed. R. Civ. P. 11. The Zahrans' appeal was docketed in this Court as appeal No. 98-1905 *("Zahran V").*

On April 27, 1998, the Zahrans filed a motion in this Court to consolidate *Zahran IV and Zahran V.* Invoking principles of judicial economy, they argue that both actions arise out of the same set of operative facts. The motion is opposed by defendants Frankenmuth and Manitowoc County Sheriff Thomas Kocourek; they contend that notwithstanding distant points of common origin in this litigation, *Zahran IV* stems from a writ of execution entered pursuant to this Court's decision in *Zahran I* by Judge Curran in the Eastern District of Wisconsin, while *Zahran V* arises in large measure from the execution of a search warrant issued by a state court judge.[2]

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[2] The Zahrans are also involved in four additional appeals now pending in this Court. Appeals No. 97-3710 and No. 98-2123, which have been consolidated, and appeals No. 97-3813 and No. 98-2122, which have also been consolidated, arise from a complaint docketed as cause No. 95 C 334 in the United States District Court for the Eastern district of Wisconsin.

## II. DISCUSSION

### A. Jurisdiction to consider Zahran IV

Federal appellate courts have jurisdiction over final orders of the district courts. See 28 U.S.C. § 1291. Generally, an order is final for purposes of the statute if it "ends the litigation on the merits and leaves nothing for the district court to do but execute the judgement." *Baltimore Orioles, Inc. v. Major League Players Ass'n,* 805 F. 2d 663, 666 (7th Cir. 1986). Post judgement proceedings, however, are treated for appellate purposes as separate lawsuits. Orders entered during such proceedings may be appealed, but only if they are final orders. In this regard, a post-judgement order need not dispose of all of the issues raised in the order. *See, e.g., Central States, S.E. & S.W.. Areas Pension Fund v. Express Freight Lines, Inc.*, 971 F.2d 5,6 (7th Cir. 1992); *Transportation Cybernetics, Inc. v. Forest Transit Comm'n,* 950 F.2d 350,352 (7th Cir. 1991); *S.E.C. v. Suter,* 832 F.2d988, 990 (7th Cir. 1987). The district court's order of February 14, 1997, granted Frankenmuth's motion for a writ of execution and denied the Zahrans' objection to the motion. Ten days later, *see* Fed. r. Civ. P. 62(a), the writ of execution issued. The February 14 order is thus a final, appealable, post-judgement order.

Nevertheless, it is unclear whether the May 29, 1997, satisfaction of judgement in cause No. 90C 337 has mooted the appeal in *Zahran IV,* thereby depriving this Court of jurisdiction for want of a live case or controversy. *See* U.S. Const., art. III, § 2; *Wegscheid v. Local Union* 2911, 117 F.3d 986, 990 (7th

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It is impossible at this stage of the litigation - no records on appeal have yet been transmitted - to determine the extent to which the actions are related to the matters discussed herein. Accordingly, these appeals shall be permitted to proceed for the time being.

Cir. 1997); 13A Wright & Miller, Federal Practice and Procedure, § 3533.2 (1955 & Supp. 1998); If the Zahran's payment in satisfaction of the judgement represents an abandonment of their challenge to the validity of the writ of execution, *Zahran IV* is moot and will be dismissed.

Accordingly, the parties in *Zahran IV* are ordered to provide statements and memoranda explaining why, in light of the satisfaction of judgement, this Court should not dismiss *Zahran IV* as moot.

**B. The Merits of Zahran V**

*Zahran V* arises from a state court's issuance in April 1996, of a search warrant based on probable cause to believe that the Zahrans were violating Wisconsin statutes regulating the care and treatment of farm animals. *See* Wis. Stat. §§ 951.13-.16 (West 1998). The Manitowoc County sheriff declared at the probable cause hearing that he had observed an inordinate number of calves and cattle on the Zahran's farm that were either underweight or dead (apparently of starvation), and that the feeding equipment and shelter on the farm appeared to be in disrepair and unstocked. The Zahrans, however, argued before the district court that officials of Manitowoc County, including the sheriff, conspired with Franklinmuth to seize the Zahrans' property in satisfaction of the judgement entered in cause No. 90 C 337, despite the lack (at the time) of a valid writ of execution. They further allege that the sheriff was driven by ethnic animus (Mr. Zahran is Arabic); that the defendants tricked the state court judge into issuing the search warrant; and that an affidavit filed in he district court by Robin Zahran provides ample evidentiary support for these allegations.

While the Zahrans contend that the district court erred in granting summary judgement in favour of the defendants, *see Waldredge v. American Hoechst Corp.*, 24 F.3d 918, 920-22 (7th Cir. 1994), they misconstrued the district court's ruling. Judge Leinenweber dismissed the complaint against

Frankenmuth in cause No. 97 C 978 on August 12, 1997, based on principles of *res judicata*, collateral estoppel, and the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 338 (7th Cir. 1995); *Meyer v. Ridgon*, 36 F.3d 1375, 1379 (7th Cir. 1994). After further briefing by the remaining litigants, the district court again concluded that it was being asked, in essence, to review the state court's decisions regarding the search warrant, thereby raising the jurisdictional bar imposed by *Rooker-Feldman*. *See Feldman*, 460 U.S. at 482-84; *GASH Assoc. v. Village of Rosemont*, 995 F.2d 726, 728-29 (7th Cir. 1993); *Ritter v. Ross*, 992 F.2d 750, 753-43 (7th Cir. 1993).

On appeal, the Zahrans have invited this Court to determine for itself whether the evidence supports their conclusion that the defendants duped the state court judge and that the search warrant should never have issued. A *de novo* review of the record in *Zahran V*, taking all well-pleaded allegations as true and drawing all reasonable inferences in the Zahrans' favor, reveals no basis on which to conclude that the district court misapprehended the nature of the requested relief. *See Kamilewicz v. Bank of Boston Corp.*, 92 F. 3d 506, 509-10 (7th Cir. 1996). To the contrary, the district judge correctly determined that the injury alleged was caused by the state court's decision to issue, and its subsequent refusal to vacate, the search warrant. Where, as here, the harm giving rise to the complaint stems from a state court judgement or is "inextricably intertwined" with the merits of that decision, *Feldman*, 460 U.S. at 483 n. 16, *Rooker-Feldman* precludes the lower federal courts from reviewing the state court's judgement. *See Garry v. Geils*, 82 F. 3d 1362, 1365-66 (7th Cir. 1996); *see also Centres, Inc. v. Town of Brookfield*, 148 F.3d 699, 702-03

(7th Cir. 1998); *Homola v. McNamara*, 59F.3d 647, 650-51 (7th Cir. 1995).

Summary affirmance is an exception to the normal consideration of a matter of appeal, and would be employed only where the propriety of such action is clear and where the "position of one party is so clearly correct as a matter of law that no substantial question regarding the out come of the appeal exists." *Williams v. Chrans*, 42F.3d 1137, 1139 (7th Cir. 1994) (internal quotation and citation omitted). Despite this stringent standard, summary affirmance in the matter is appropriate. The Zahrans have entirely misperceived the basis on which their abuse of process claims were resolved by the district court; a call for briefs by the Court would be "nothing but an invitation for the parties to waste their money and the court's time." *Mather v. Village of Mundelein*, 869 F.2d 356,357-58 (7th Cir. 1989); *see also Taylor v. city of New Albany*,979 F.2d 87 (7th Cir. 1992). Accordingly, the decision of the district court is summarily affirmed.

**C. Rule 38 Sanctions**

This circuit imposes a two-part test to determine the propriety of appellate sanctions. First, the court must conclude that the appeal is frivolous; and second, that sanctions are appropriate. *See Depositor v. Mary M. Holloway Foundation*, 36 F.3d 582, 588 (7th Cir. 1994). An appeal is frivolous when "the result is foreordained by the lack of substance tot he appellant's argument," *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (en banc), or when the appeal "merely restates arguments that the district court properly rejected," *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F.2d 1399, 1406 (7th Cir. 1992) (internal quotation and citation omitted). In determining whether sanctions are appropriate, the Court generally requires some indication of bad faith, suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgement

and for purposes of delay, harassment, or out of sheer obstinacy. *See Flexible Mfg. Sys. Pty., Ltd. v. Super Products Corp.*, 86 F.3d 96, 101 (7th Cir. 1996); *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 331 (7th Cir. 1995); Depositor, 35, F.3d at 588.

Briefing in *Zahran V* was suspended shortly after counsel for plaintiffs-appellants filed their opening brief. Because of the early stage of the litigation on appeal in *Zahran V* and because "the line between bad faith and mere ineptitude is often difficult to ascertain," *Bacon v. American Fed'n of State, County, and Mun. Employees counsel*, 795 F.2d 33,35 (7th Cir. 1986) (Ripple, J., concurring in part and dissenting in part), the Court declines to impose monetary sanctions based on the Zahrans' appeal of *Zahran V*. *See* Fed R. App. P. 38, advisory committee notes; *McDonough v. Royal Caribbean Cruises, Ltd*, 48 F. 3d256, 258-59 (7th Cir. 1995) (court of appeal may call for sanctions on its own motion). Pursuant to this Court's Internal Operating Procedure Four, however, the defendants in this matter will be awarded costs reasonably incurred in defending this appeal.

The ability to sanction vexatious litigants falls within the inherent power of the federal courts. *See Chambers V. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-54 (1991). In this regard, the courts are obligated to allocate their resources so as to assure that the interest of justice are served and the courthouse doors remain open to all, not simply to the relentless. *See In re McDonald*, 489 U.S. 180, 184 (1989); *Procup v. Strickland*, 792 F.2d 1069, 1073-74 (11th Cir. 1986) (en banc) (per curium); *In re Martin-Trigona*, 737 F.2d 1254, 1261-62 (2d Cir. 1984); *Ruderer v. Fines*, 614 F.2d 1128, 1130-32 (7th Cir. 1995); *Support Systems Int'l, Inc. v. Mach*, 45 F.3d 185 (7th Cir. 1995).

Year after year, the Zahrans have refused to accept the adverse judgements handed them by the various courts of this circuit. Their repeated response has simply been to file another suit in a different district court, despite repeated determinations that the actions are meritless or are otherwise barred from re-litigation.

Accordingly, **IT IS ORDERED** that:

1. the Zahrans shall submit to this court by noon on September 30, 1998, a list and description of all of the sanctions imposed against them, either individually or jointly, by any federal court in this circuit, together with a statement of the amounts paid on each of these awards and the dates on which they were paid. Pursuant thereto, the clerks of the federal courts in this circuit are hereby instructed to return unfiled any documents tendered by or on behalf of the Zahrans,[3] either jointly or individually, until the Zahrans furnish the Court with this list and demonstrate that all such sanctions have been paid in full;

2. upon compliance with the preceding directives, the Zahrans shall be required to obtain leave of this Court before filing in any federal court in this circuit another sit against any of these defendants or their agents, arising out of the 1989 and 1990 storm and fire damage to the Zahrans' farm. Pursuant thereto, the Zahrans must submit to the clerk of this Court a motion for leave to file any such suit, which motion shall be accompanied by copies of the proposed complaint and this order. The motion must either (a) be prepared and filed by

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3 An exception is made for criminal cases in which the Zahrans, either individually or jointly, are defendants, or for any applications for writs of habeas corpus that the Zahrans may wish to file. See Support Systems Int'l, Inc. v. Mach, 45 F.3d 185, 186 (7th Cir. 1995).

a licensed attorney, or (b) if filed by the plaintiffs(s) *pro se,* be accompanied by a memorandum of law in support of their claims , which shall include an affidavit certifying that the claims they seek to present are not frivolous and have never before been raised in a prior suit;

3. the Zahrans, either individually or jointly, shall be authorized to submit, no earlier that two years from the date of this order, a motion to modify or rescind this order; and

4. the Zahrans are instructed that the federal courts of this circuit, including this Court, reserve the right to initiate contempt proceedings against them if they continue to file new actions or otherwise act in violation of this order.

*See, e.g., Verdone,* 73 F.3d at 674-75; *In re Kozol,* 73 F.3d 124 (7th Cir. 1995); *Sloan v. Commissioner,* 53 F.3d 799, 800 (7th Cir.1995); *Mack,* 45 F.3d at 186-87.

**IT IS FURTHER ORDERED** that the motion to consolidate appeals No 97-1712 *(Zahran IV)* and No. 98-1905 *(Zahran V.)* is **DENIED.**

**IT IS FURTHER ORDERED** that the parties in appeal No. 97-1712 *(Zahran IV)* shall file statements of position and memoranda explaining why the appeal should not be dismissed as moot following the satisfaction of judgement in cause No. 90 C 337. The parties' statements of position and memoranda shall be filed with this Court by noon on September 30, 1998.

**IT IS FURTHER ORDERED** that defendants' motions for summary affirmance of the district court's order in cause No. 97 C 978 are **GRANTED**. The decisions of the district court underlying appeal No. 98-1905 (*Zahran V*) are hereby summarily affirmed. Costs reasonably incurred in appeal are awarded to the defendants in *Zahran V*, *see* Fed. R. App. P. 39, who are directed to file their statements of costs by noon on September 30, 1990.

**SO ORDERED.**

NOV-4-1998 13:18 SHANNON & ASSOCIATES
312 332 0600 P.01/08

Law Offices of Andrew M. Cohen
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Phone: 312/460-8785
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**FACSIMILE COVER SHEET**

FACSIMILE NUMBER: 630/574-8444

To: Robin Zahran
Of: Oakbrook Associates Financial Services
From: Andrew M. Cohen
Client/Matter: Supreme Court Petition for Stay
Date: November 4, 1998

Number of Pages (including Cover Sheet): 26

COMMENTS:

Attached is a copy of the Petition sent to the Supreme Court, and which was served on all of the parties as well as the Seventh Circuit. As I advised you, this was done on October 30, 1998, and I personally delivered the copy of the Seventh Circuit

NOV-4-1998 13:18 SHANNON & ASSOCIATES
312 332 0600 P.02/02

No. _____

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IN THE
SUPREME COURT OF THE UNTIED STATES
OCTOBER TERM, 1998

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ROBIN ZAHRAN and KAREN ZHARAN,
*Plaintiffs-Petitioners,*

v.

FRANKENMUTH MUTUAL INSURANCE COMPANY, THOMAS H. KOCOUREK, Sheriff of Manitowoc County, Wisconsin and his agents and representatives and the Corporation of Manitowoc County, Wisconsin, ROBERT ZEITNER, STEVEN L. POPUCH, and the LAW FIRM OF SWIFT, POPUCH & SINCLEAR,
*Defendants-respondents.*

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ON PETITION FOR A STAY OF MATTERS PENDING IN THE UNITED STTES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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312/46-/8785
*Attorney for Plaintiffs-Petitioners*

**PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATTERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

NOW COME the Petitioners, Robin Zahran and Karen Zahran, by and through their counsel, Andrew M. Cohen, and as and for their Petition the Honorable Justice Paul Stevens, the Circuit Justice for the United States Court of Appeals for the Seventh Circuit to stay the enforcement of the Order entered by the United States Court of Appeals for the Seventh Circuit on September 17, 1998, as well as the Order of the United States Court of Appeals for the Seventh Circuit issued on October 29, 1998, present to This Court, the following:

The jurisdiction in the Court of Appeals was pursuant to 28 U.S.C. § 1291 following a Notice of Appeal from the United States District Court, which had jurisdiction pursuant to both 28 U.S.C. § 1331 and 28 U.S.C. § 1332.

The Petitioners have additional matters pending in the United States Court of Appeals for the Seventh Circuit including *Robin Zahran and Karen Zahran vs. Frankenmuth Mutual Insurance Company*, Number 97-1712; *Robin Zahran and Karen Zahran vs. Cleary Building Corporation et al.*, Number 97-3813; *Robin Zahran and Karen Zahran vs. Cleary Building Corporation et al.*, Number 98-2122; *Robin Zahran and Karen Zahran vs. Gerald G. Schmidt Jr., et al.*, Number 97-3710; and *Robin Zahran and Karen Zahran vs. Gerald G. Schmidt Jr., et al.*, Number 98-2123.

On September 17, 1998, during the pendency of the appeal in *Robin Zahran and Karen Zahran vs. Frankenmuth Mutual Insurance Company, Thomas H. Kocourek, Sheriff of Manitowoc County, Wisconsin and His Agents and Representatives and the Corporation of Manitowoc County,*

*Wisconsin, Robert Zeitner, Steven L. Popuch, and the Law Firm of Swift, Popuch & Sinclair,* Number 98-1905, the Seventh Circuit issued an Order which summarily affirmed the judgment of the district court, and which required that the Zahrans file a list of sanctions pending from the district courts of the Seventh Circuit, as well as proof of payment of those sanctions. The Seventh Circuit further ordered that the Zahrans would not be allowed to file any documents, with the exception of filings in criminal matters, until the sanctions were paid. The Seventh Circuit granted the Zahrans permission to petition the Seventh Circuit a petition to rescind or modify the Order no earlier than two years from the date of the Order. A copy of this Order is attached hereto.

On September 29, 1998, pursuant to the September 17, 1998 Order, the Zahrans, through counsel, filed their List of Sanctions with the Court of Appeals, as well as a Motion for Extension of Time to file Proof of Payment. The List of Sanctions listed four matters, two of which were sanctions for which all pleadings had been completed and appeals exhausted, one which was the subject of a pending appeal, and one which the district court had not yet determined the amount of the sanctions. Included in the filing were statements that counsel was in possession of checks to pay the first two of the outstanding sanctions.

On October 2, 1998, pursuant to the List of Sanctions as well as the Motion filed on September 29, 1998, the Court of Appeals advised that there had been sanctions entered against the Zahrans in the fourth case listed above, and required that Proof of Payment be filed by noon on October 19, 1998.

On October 6, 1998, the Seventh Circuit Court of Appeals issued Orders suspending the briefing in four of the matters, 97-3813, 98-2122, 97-3710, and 98-2123. Copies of those Orders are attached hereto.

On October 19, 1998, counsel filed a second Motion for Extension of Time to File Proof of Payment, and on October 21, 1998 counsel filed a Supplemental Statement Regarding Proof of Payment, along with copies of checks, and advised the court that despite attempts at communication with the defendants to arrange payment, counsel had not received any information from those defendants regarding making the payments of the sanctions.

On October 29, 1998 the Seventh Circuit Court of Appeals issued an Order denying the second Motion for Extension of Time to file Proof of Payment, and further ordered that proof of payment be submitted before 5:00 p.m. on October 30, 1998, with that Order being transmitted via facsimile at or around 4:00 p.m. to counsel.

The Zahrans desire and intend to file a Petition for a Writ of Certiorari to the United States Supreme Court from the rulings of the United States Court of Appeals for the Seventh Circuit dated September 17, 1998, October 2, 1998, and October 29, 1998. The Zahrans are aware that they have until on or about December 16, 1998 to file their Petition for a Writ of Certiorari from the Order of September 17, 1998, and said Petition shall be filed in a timely fashion. In the event that the Stay is not granted and the Zahrans must proceed in all matters pending before the United States court of Appeals for the Seventh Circuit, the Zahrans will be prejudiced and hampered in their pleadings by the Orders which are outstanding in the separate appeals.

The September 17, 1998 Order, which was entered in two matters, Seventh Circuit case numbers 97-1712 and 98-1905, has a grave impact on the appeals pending under Seventh Circuit docket numbers 97-3713, 98-2122, and 98-2123, as the tone of the Order indicates that there has been a pre-judgment of the Zahrans as well as the merits of their claims as footnote 2 of the Order indicates.

> 2. The Zahrans are also involved in four additional appeals now pending in the Court. Appeals No. 97-3710 and No. 98-2123, which have been consolidated, and appeals No. 97-3813 and No. 98-2122, which have also been consolidated, arise from a complaint docketed as cause No. 95 C 334 in the United States District Court for the Eastern District of Wisconsin.
>
> It is impossible at this stage of the litigation-no records on appeal have yet been transmitted-to determine the extent to which the actions are related to the matters discussed herein. Accordingly, these appeals shall be permitted to proceed for the time being.

In addition to the above mentioned quotation from the footnote, the Court of Appeals seems to have pre-judged the quality and competence of counsel, albeit to the favor of the Zahrans, by stating "Because of the early state of the litigation on appeal in Zahran V and because 'the line between had faith and mere ineptitude is often difficult to ascertain," [citation omitted], the court declines to impose monetary sanctions based on the Zahrans' appeal of Zahran. V." September 17, 1998 Order at page 11.

Due to the language and the tenor of the Orders from the United States Court of Appeals for the Seventh Circuit as well as the denial of the latest request for additional time to make payments to the various parties to whom sanctions are owed despite attempts by the Zahrans and their counsel to make those payments, the Zahrans will be unable to obtain this relief in the United States Court of Appeals for the Seventh Circuit.

For these reasons, Your Honor should grant the Stay of all of the following pending matters in the United States Court of Appeals for the Seventh Circuit. *Robin Zahran and Karen Zahran vs. Frankenmuth Mutual Insurance Company*, Number 97-1712; *Robin Zahran and Karen Zahran vs. Frankenmuth*

*Mutual Insurance Company, Thomas H. Kocourek, Sheriff of Manitowoc County, Wisconsin and His Agents and Representatives and the Corporation of Manitowoc County, Wisconsin, Robert Zeitner, Steven L. Popuch, and the Law Firm of Swift, Popuch & Sinclair,* Number 98-1905; *Robin Zahran and Karen Zahran vs. Cleary Building Corporation et al.*, Number 97-3813; *Robin Zahran and Karen Zahran vs. Cleary Building Corporation et al.*, Number 98-2122; *Robin Zahran and Karen Zahran vs. Gerald G. Schmidt Jr., et al.*, Number 97-3710; and *Robin Zahran and Karen Zahran vs. Gerald G. Schmidt Jr., et al.*, Number 98-2123, pending the outcome of the Zahran's Petition for a Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

Robin Zahran and Karen Zahran

_____

By: One of their Attorneys

Law Offices of Andrew M Cohen
8 South Michigan Avenue
26th Floor
Chicago, Illinois 60603
312/460-8785

CERTIFICATE OF FILING

I, Andrew M. Cohen, an attorney certify that I filed the within PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATTERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, by sending the same to the Clerk of the United States Supreme Court, Supreme Court Building, Washington, DC 20534, via Federal Express on October 30, 1998 before 5:00 p.m.

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CERTIFICATE OF SERVICE

I, Andrew M. Cohen, an attorney certify that I filed the within PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATTERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, by personally delivering a copy to the United States Court of Appeals for the Seventh Circuit, and by placing a copy in the United States Mail before 5:00 p.m. on October 30, 1998, with proper first-class postage prepaid, addressed to the following counsel of record and/or parties:

Steven L. Popuch, Esq.
Swift, Popouch & Sinclair
200 West Adams Street
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Richard A. Buchanan, Esq.
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733 N. Van Buren Street
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Mr. Charles H. Bohl
Whyte, Hirschboeck, Dudeck, S.C.
111 E. Wisconsin Ave., Ste 2100
Milwaukee, WI 53202

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeal from the United |
| No. 97-1712 | )States District Court for |
| v. | )the Eastern District |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | )of Wisconsin |
| | ) No. 90 C 337 |
| | )Thomas J. Curran, |
| | ) Judge |
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | )Appeal from the United |
| | )States District Court |
| | )for The Eastern District |
| 97-3710 & 98-2123 | )of Wisconsin. |
| v. | ) |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | ) No. 95 C 334 |
| | )Charles N. Clevert, |
| | ) Judge |
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeal from the United |
| | )States District Court for |

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| | )the Eastern District of |
| No. 97-3813 & 98-2122 | )Wisconsin. |
| v. | ) |
| | ) |
| CLEARY BUILDING | ) |
| CORPORATION, | ) No. 93 C 543 |
| Wisconsin Corporation, and | ) |
| RALPH UECKER AND SONS, | ) |
| INCORPORATED, | )Charles N. Clevert, |
| Defendants-Appellees | ) Judge |

**EMERGENCY MOTION TO INTERVENE AND TO AMEND PLAINTIFFS-APPELLANTS' BRIEFS FILED ON AUG. 7, 1998, DEC. 4, 1998, DEC. 15, 1998 AND DEC. 16, 1998, REFERENCING THE ABOVE APPEALS. BASED ON APPELLANTS COUSEL INADEQUACY, LACK OF PREPARATION, FRAUD, AND MISREPRESENTIONS AND THE FILING OF INADEQUATE BRIEFS.**

NOW COMES, the Plaintiffs-Appellants, Robin Zahran and Karen Zahran and move this Honorable Court to grant their emergency motion to intervene and to refile their briefs so that the briefs would accurately reflect the facts and the arguments that led to their multiple litigation's over the last nine years in the District Courts and this Court, due to the fact that attorney Cohen failed to raise the facts and arguments necessary to have a meaningful review by this court.

Plaintiffs-Appellants believe that attorney Cohen acts in pursuing the preparation of the briefs were fraudulent and in total contradiction to what he represented to Appellants throughout his representation and in violation of this Honorable Court rules and in support of these Appellants motion and due

to the seriousness of the matter Plaintiffs present to the court as follows:

1. Attorney Cohen was retained to prepare appeal briefs along with appendixes in the above captioned appeals. Although some of the facts are the same most of the arguments are different as they relate to the issues of these disputes.

2. Pursuant to discussions between Plaintiffs and Attorney Cohen, he reviewed all the files of these above appeals before he entered into agreement of representation. He visited Appellant Robin Zahran office, located at 1301 W. 22nd Street, Ste. 815 in OakBrook, Illinois and spent almost an entire day reviewing the documents to familiarise himself with the issues and the facts. See Exhibit 1 affidavit of Robin Zahran and Catherine Jankovic

3. Attorney Cohen agreed to familiarise himself with all the facts and legal arguments and discuss and review them with the Plaintiffs-Appellants and review the briefs before they are to be filed with this Court. Attorney Cohen commitment for such representation was made to Robin Zahran and Catherine Jankovic. See Robin Zahran and Catherine Jankovic's affidavit.

4. Zahran's were to inspect the briefs as to all facts and to make sure no erroneous facts are contained there in, and to their accuracy, and to bring issues of law to the attention of Cohen if there was anything missing, read the pleadings, and heard almost all the arguments involved in these appeals by all parties. That condition of review of the appeal briefs was a must due to the complicity of Zahran's cases.

5. The first two briefs were filed without Zahran's knowledge of what was contained in them resulting in sanctions

in one of them against Zahran of which they believe could have been avoided had Cohen argued the only reason Zahrans filed their suit to start with. Which he failed to do.

6. Andrew Cohen was suppose to come to Zahran's office to work on the fourth brief, after 4 days of Cohen refusing to return phone calls, paging, faxing letter of concern by Plaintiff Zahran. Catherine Jankovic administrative assistant to Zahran called the Appeal Court clerk who notified her that the appeal brief # 97-3813 & 98-2122 was filed on Wednesday, Dec. 16.

7. Attorney Cohen received all the money necessary to order any and all transcripts of the proceedings in the District Court and it was just discovered on Wednesday, Dec. 16, he did not order all the transcripts, although he was paid.

8. Cohen prepared a brief for appeal No. 97-3813 & 98-2122 (the Cleary matter). Robin Zahran reviewed the only brief given for review before filing the brought to the attention of Cohen that this brief was worthless and meaningless as it contained no facts or arguments relating to what had occurred in he District Court trail nor was the transcripts of the trial referred to as what errors may have had happened, nor did Cohen raise all the arguments necessary to prevail with this Court and that such brief will result in losing the probably sanctions.

9. Cohen agreed that the brief did not contain the facts or arguments necessary to present the issues to the Appeal Court and agreed to re-draft the appeal brief based on accurate facts, and legitimate arguments and work with both the Plaintiffs in the preparation of their remaining briefs.

10. The Appellants questioned Attorney Cohen on numerous occasions as to the status of their appeal briefs, all times Cohen stated everything is under control, that if he needs anything, he will call, that he had copied the entire files of the District Courts record on appeal, that he had all the arguments and the law researched and he is only working on the facts to support his arguments that he already drafted.

11. Plaintiffs through this period supplied all the information requested form them by Mr. Cohen. Plaintiffs became suspicious in lieu of the fact that Attorney Cohen should have had all the record on appeal in his possession, as he stated and is in no need of any more of these documented facts.

12. Realizing that Attorney Cohen may have been behind or in lack of the knowledge of the facts. Plaintiffs Karen Zahran took of work to try to answer Mr. Cohen questions referencing any questions of facts. Robin Zahran was available at all times for any question by Attorney Cohen. Karen Zahran visited Attorney Cohen's office, then she discovered that he did not read one single volume of transcript of the trials nor did he prepare any arguments, nor statements of facts, nor had he done any research referencing Plaintiffs-Appellants briefs that was due Dec. 4, , Dec. 9, and Dec. 16, 1998 and questioned Attorney Cohen as to his ability to write briefs in a complete matter with no knowledge of the facts and the law.

13. Cohen presented to Karen Zahran that he did not have time due to other issues in the last few months, and other trials resulting in him not spending time on these briefs. Cohen requested that Karen Zahran take the transcripts in the Schmidt appeal # 97-3710 & 98-2123 Friday, Dec. 4 and prepare along with Robin the statement of facts and to attempt to supplement

it with other facts that was proven at trial that maybe in Appellants possession or could be remembered by Plaintiffs proposed finding of facts or other pleadings in the District Court. Karen Zahran had no option, but to bring these documents home and to attempt to prepare the statement of facts. Cohen refused to give her copy of the brief that he allegedly filed on Dec. 4 and further refused to give her copy of all the arguments that he alleged he prepared to raise in the two remaining appeal briefs.

14. Plaintiffs attempted to prepare the statement of fact over the week end, and notified Attorney Cohen that they had prepared most of the facts from what he gave them in transcripts and the file. Looking for direction, the Appellants offered to work with Mr. Cohen and to make their secretary available to help him out. In fact they worked at Attorney Cohen's direction through Sunday Dec. 14, 1998 till 1:00 and Monday morning Dec. 15.

15. Attorney Cohen wanted to file the Schmidt brief on Dec. 9 and when questioned how was he going to file a brief with no supporting facts or strong arguments, he stated he already prepared a good brief, Robin Zahran requested of him to give him a copy at which time Cohen admitted he did not prepare one. Zahran offered to assist Mr. Cohen in the preparation of the brief and mad himself, Cathy Jankovic, his secretary and Karen Zahran available and to work exclusively with Mr. Cohen to prepare a brief, if Mr. Cohen would come to Zahran's office. It was obvious that attorney Cohen did have no knowledge of the issues or the facts and Zahran's became very concerned. Cohen agreed that he was not prepared not did he know the issues. See Cohen correspondence. Exhibit 3

16. Over the week end the Appellants prepared the appendix referencing the facts, and finished typing the facts that were relevant from the transcripts. Attorney Cohen came on Sunday morning, Dec. 14, corrected, summarised, or changed the facts as he saw fit, and allegedly added the arguments that were raised that day to the previous arguments that were brought to his attention and drafted by him earlier. Plaintiffs-Appellants did not read the arguments, nor the statement of facts in that brief as it was approximately 1:00 a.m. Dec. 14, 1998. Attorney Cohen took all the briefs and exhibits with him for filing leaving no copy of the brief for Zahrans to read. Further he took the previous Cleary Building matter brief with him stating that he will not file that brief. See Exhibit 3 referencing facts and arguments that were sent to Attorney Cohen by Plaintiffs.

17. On Dec. 9, Attorney Cohen visited Zahran in the Oakbrook office both Plaintiffs asked Attorney Cohen if the same is occurring with appeal # 97-3813 and 98-2122, (the Cleary matter), and he admitted that he did not prepare facts from the transcripts, nor did he read the court transcripts. Zahrans communicated to Cohen that they will attempt to prepare the statements of facts from the record and transcripts if he makes them available after the Schmidt brief is done. Cohen agreed, and he brought the transcripts with him on Friday Dec. 11, 1998, and left it at Zahran's office.

18. Cohen promised on Sunday night that he will come back to Oakbrook office after he files the Schmidt appeal brief immediately on Monday, Dec. 14, 1998 to start the preparation of the brief in the Cleary matter. Zahran and Cathy Jankovic put everything aside and pursued the preparation of the statement of facts from the Cleary trail transcripts. Cohen never showed up as he promised Robin Zahran, and Cathy

Jankovic attempted to call him. No phone call was ever returned after Monday morning at 8:30 in which Mr. Cohen represented to Zahran that he is adding the arguments to the brief that he did not have the night before including the trial by jury, the failure of the judge to recuse himself, and the fact that Zahrans proved the falsity of every allegation of misrepresentation stated by Frankenmuth in the underlying trail in the Schmidt matter. Zahran and Jankovic attempted to contract Mr. Cohen on Monday, Tuesday and Wednesday by phone, by paging and by faxing is numbers, but no reply came.

Zahran became very suspicious of Attorney Cohen's failure to respond, and called the Appeal Court clerk who notified them that an appeal in the Cleary matter was filed on Wednesday, Dec. 16, 1998.

19. At all times, the Plaintiffs co-operated with every request made by Attorney Cohen and supplied him with many of the facts and legal argument that they thought were relevant and were proved at trial. These Plaintiffs Appellants are under no illusion that Attorney Cohen did not read the transcripts in the Cleary matter nor would he have been able to present a meaningful brief and that such filing of an appeal brief prepared by Attorney Cohen would cause him injustice due to Cohen's inadequate council, lack of knowledge of the facts and his acts of fraudulent misrepresentations throughout his retention.

20. Attorney Cohen had been engaged in misrepresentation to these appellants who did not realize the extent of his fraudulent misrepresentations until Thursday, Dec. 17, 1998 when they discovered that he did not file the writ of certiorari nor a motion to stay this court order of Sept. 17, 1998 of which he presented to these appellants that he did, nor did he file a motion to reconsider, nor did he order all the transcripts, which he was paid for, nor did he notify the Plaintiffs that he

needed help in the preparation of the facts and the arguments, until Dec. 8. 1998, nor did he file any motion for over sized briefs which he represented to Appellants that he did. In simple terms Mr. Cohen had been doing nothing but misrepresenting to these Appellants all important issues referencing the preparations and filings of adequate briefs. See Exhibit 4

21. Attorney Cohen did not file motions to reconsider or for clarification with this Court, nor did he read the facts and under belief Plaintiffs believe it would have been impossible to argue on appeal issues without specific facts. Appellants further believe that Attorney Cohen did not raise all the strong arguments that are necessary for them to prevail and in fact he deceived them by constantly being untruthful devious.

22. Plaintiffs Appellants do not know the extent of concealment, or misrepresentations of Attorney Cohen statements in every area he represented, and therefore are under the belief that a great injustice and harm to them will follow if they are not given the opportunity and within 30 days and no more from the date of receiving their file from Attorney Cohen to prepare briefs in the above appeals as they were in fact deprived of their right to counsel and due process of a fair opportunity to present their case due to his inadequacy and fraudulent misrepresentations.

Had Plaintiffs Appellants knew of Attorney Cohen's acts they would have adequately represented themselves and presented issues and facts to this court and arguments that are based on what happened in the District Courts of which they strongly believe they will prevail.

Wherefore Plaintiffs Appellants request from this Honorable Court to order Attorney Cohen to immediately turn

over their files to Appellants and to allow them to inspect the briefs he filed and to amend them based on legitimate facts and arguments within 30 days.

December 18, 1998

Respectfully submitted,

Robin Zahran

Karen Zahran

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 22, 1998
Before
Hon. **William J. Bauer**, Circuit Judge
Hon. **Joel M. Flaum**, Circuit Judge
Hon. **Michael S. Kanne**, Circuit Judge

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|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeal from the United |
| | )States District Court for |
| No. 97-1712 | )the Eastern District |
| v. | )of Wisconsin |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | ) No. 90 C 337 |
| | )Thomas J. Curran, |
| | ) Judge |
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | )Appeal from the United |
| | )States District Court |
| | )for The Eastern District |
| 97-3710 & 98-2123 | )of Wisconsin. |
| v. | ) |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON | ) No. 95 C 334 |
| | )Charles N. Clevert, |
| | ) Judge |

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| & FRAUN, et al., Defendants-Appellees | ) |
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) Appeal from the United States District Court for the Eastern District of Wisconsin. |
| No. 97-3813 & 98-2122 v. | ) |
| CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED, Defendants-Appellees | ) No. 93 C 543 ) Charles N. Clevert, Judge |

Upon consideration of the **EMERGENCY MOTION TO INTERVENE AND TO AMEND PLAINTIFFS-APPELLANTS' BRIEFS FILED ON AUG. 7, 1998, DEC. 4, 1998, DEC. 15, 1998 AND DEC. 16, 1998, REFERENCING THE ABOVE APPEALS. BASED ON APPELLANTS COUSEL INADEQUACY, LACK OF PREPARATION, FRAUD, AND MISREPRESENTIONS AND THE FILING OF INADEQUATE BRIEFS,** filed on December 18, 1998, by the pro se appellants,

**IT IS ORDERED** that the motion is **GRANTED.** Appellants are hereby **GRANTED** leave to file supplemental briefs in these matters, which briefs shall not exceed 7,000 words, pursuant to Fed. R. App. P. 32(a) (7) (B) (i).

Briefing is these matters shall proceed as follows:

1. Appellants' supplemental brief in No. 97-1712 shall be filed by January 4, 1999.

2. Appellants' supplemental brief in Nos. 97-3710 and 98-2123 shall be filed by January 11, 1999.

3. Appellants' supplemental brief in Nos. 97-3813 and 98-2122 shall be filed by January 19, 1999.

4. Appellees' in No. 97-1712 shall file their response brief by February 4, 1999.

5. Appellees' in Nos. 97-3710 and 98 2123 shall file their response brief by February 11, 1999.

6. Appellees' in Nos. 97-3813 and 98-2122 shall file their response brief by February 19, 1999.

7. Appellants' in No. 97-1712 shall file their reply brief, if any, by February 18, 1999.

8. Appellants' in Nos. 97-3710 and 98-2123 shall file their reply brief, if any, by February 25, 1999.

9. Appellants' in Nos. 97-3813 and 98-2122 shall file their reply brief, if any, by March 5, 1999.

Appellants are advised that their supplemental briefs must be received by the clerk of this court by the aforementioned due dates or they will not be filed in. The parties are advised that further motions for extensions of time will not be entertained.

Note: The parties are advised that rule 26(c), Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates of briefs are specifically set by order of this court. All briefs are due by the dates ordered.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) |
| No. 97-1712 v. | )Appeal from the United )States District Court for )the Eastern District )of Wisconsin |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | ) No. 90 C 337 ) Thomas J. Curran, ) Judge |
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | )Appeal from the United )States District Court for )The Eastern District of |
| 97-3710 & 98-2123 v. | )Wisconsin. |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | ) No. 95 C 334 )Charles N. Clevert, ) Judge |

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ROBIN ZAHRAN and

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| KAREN ZAHRAN,<br>Plaintiffs-Appellants,<br><br>No. 97-3813 & 98-2122<br>v.<br><br>CLEARY BUILDING CORPORATION,<br>Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED,<br><br>Defendants-Appellees | )Appeal from the United<br>)States District Court for<br>)the Northern District of<br>)Wisconsin.<br>)<br>)<br>)<br>) No. 93 C 543<br>)<br>)Charles N. Clevert,<br>) Judge<br>) |
| ROBIN ZAHRAN and KAREN ZAHRAN,<br>Plaintiffs-Appellants,<br><br>No. 99-1905<br>v.<br>FRANKENMUTH MUTUAL INSURANCE COMPANY,<br>THOMAS H. KOCOUKEK,<br>Sheriff of Manitowoc County, Wisc. and his agents and representatives and the Corp. of Manitowoc County, Wisc.)<br>ROBERT ZEITNER, et al. | )Appeal from the United<br>)States District Court for<br>)the Northern District of<br>)Illinois.<br>)<br>)<br>) No. 97 C 978<br>)<br>) Harry D.<br>) Leinenweber,<br>) Judge |

APPEALLANTS EMERGENCY MOTION TO COMPEL THE TURN OVER OF APPEALLANTS FILES THAT ARE IN THE POSSESSION OF ATTORNEY COHEN TO APPEALLANTS

NOW COMES, Plaintiff-Appellants, Robin Zahran and Karen Zahran, in the above captioned appeals, move this Honorable Court to direct Attorney Cohen to turn over their files in the above captioned briefs immediately to Appellants so they could file their supplemental briefs as directed by this court pursuant to order of 12/22/98 and in support of their motion state as follows:

1. These Appellants discovered fraud, misrepresentation, lack of preparation and inadequacy of counsel and immediately filed their emergency motion to intervene and to amend Plaintiffs briefs filed on Dec. 4, Dec. 15, and Dec. 16, 1998.

2. These Appellants, in their emergency motion to intervene, (filed on Dec. 18, 1998) requested that this Honorable Court direct Attorney Cohen to turn over their files so they would be able to file amended briefs.

3. This Honorable Court granted Appellants' motion and directed Appellants to file supplemental briefs within short and specified times. The Court did not address the files issue referencing the turn-over of trial transcripts, summary of facts, and legal research that these Appellants have prepared and given to Attorney Cohen of which he removed from their offices on Dec. 14, 1998.

4. Attorney Cohen is a sole practitioner and had left his office and will not be returning back until Jan. 6, 1999, as he stated to these Appellants..

5. Attorney Cohen currently occupies an office with Attorney Shannon and Associates located at 8 S. Michigan Ave. 26th Floor, Chicago, IL and under information and belief all these Plaintiffs files and work papers are located at that office.

6. Appellants will be in urgent need of the transcripts which consist of approximately 3,000 pages in the Schmidt matter and 1,000 pages in the Cleary matter as they

were marked and underlined, referring to all the facts necessary to prepare their supplemental briefs in Appeal # 97-3710 & 98-2123 and Appeal # 97-3813 and 98-2122. Appellants will not be able to adequately prepare the relevant statement of facts from the court transcripts within the short time allowed if they are to start from ground zero again.

7. Much work was done by Appellants which Attorney Cohen removed from their office. This work include legal research and statement of facts

8. Appellants will be able to inspect the file on Appeal # 97-1712 as it is located in the U.S. Circuit Court of Appeals located in Chicago, but would lack the legal research that was already made by them and is in the position of Attorney Cohen.

9. Attorney Cohen had been paid in full for his services and filed his Motion to Withdraw on 12/18/98.

WHEREFORE, Plaintiffs Appellants pray this Honorable Court to direct Attorney Shannon & Associates and Attorney Cohen to turn over Appellants files immediately and before Thursday, Dec. 31 so that Plaintiffs-Appellants could file their supplemental briefs timely as ordered by this Court on Dec. 22, 1998.

In the alternate, Appellants pray this Court grant any relief or order that they deem proper under the circumstances so that Appellants are able to file the supplemental briefs.

Respectfully submitted,

Robin Zahran

Karen Zahran

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
December 29, 1998

By the Court:

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|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) |
| No. 97-1712 v. | )Appeal from the United States District Court for the Eastern District of Wisconsin |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | ) No. 90 C 337 ) Thomas J. Curran, Judge |
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | )Appeal from the United States District Court for The Eastern District of Wisconsin. |
| 97-3710 & 98-2123 v. | |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | ) No. 95 C 334 )Charles N. Clevert, Judge |

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|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeal from the United )States District Court for )the Eastern District of |
| No. 97-3813 & 98-2122 v. | )Wisconsin. ) ) |
| CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED, | ) No. 93 C 543 ) ) |
| Defendants-Appellees | )Charles N. Clevert, ) Judge ) |

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Upon consideration of **APPELLANTS EMERGENCY MOTION TO COMPEL THE TURN OVER OF APPELLANTS FILES THAT ARE IN THE POSSESSION OF ATTORNEY COHEN TO APPELLANTS**, filed on December 29, 1998, by counsel,

**IT IS ORDERED** that the motion is **DENIED.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| ROBIN ZAHRAN and KAREN ZAHRAN<br>Plaintiffs-Appellants,<br><br>97-3710 & 98-2123 v.<br><br>GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,<br>Defendants-Appellees | )<br>)Appeal from the United<br>)States District Court for<br>)The Eastern District of<br>)Wisconsin.<br>)<br>)<br>)<br>) No. 95 C 334<br>)<br>)Charles N. Clevert,<br>) Judge<br>)<br>)<br>)<br>)<br>)<br>) |
| ROBIN ZAHRAN and KAREN ZAHRAN,<br>Plaintiffs-Appellants,<br><br>No. 97-3813 & 98-2122<br>v.<br><br>CLEARY BUILDING CORPORATION, a Wisconsin Corporation, and RALPH UECKER AND SONS, | )Appeal from the United<br>)States District Court for<br>)the Eastern District of<br>)Wisconsin.<br>)<br>)<br>)<br>) No. 93 C 543<br>)<br>) |

INCORPORATED, )Charles N. Clevert,
) Judge
Defendants-Appellees )

EMERGENCY MOTION FOR EXTENSION OF TIME BY 11 DAYS OR UNTIL JANUARY 22, 1998 IN APPEAL NO. 97-3710 & 98-2123 AND TO FILE AN OVERSIZED SUPPLEMENTAL BRIEF TO THE EXTENT OF 12,000 WORDS IN APPEAL NO.S 97-3710 & 98-2123 AND 97-3813 & 98-2122

NOW COMES Plaintiff-Appellants, Robin Zahran and Karen Zahran, appearing pro se and move this Honorable Court to grant their motion an extension of time by 11 days in Zahran vs. Schmidt, et. al No. 97-3710 & 98-2123 to file their supplemental brief and to allow them to file an oversized brief to the extent of 12,000 words in the same appeal (No. Appeal 97-3710 & 98-2123) and in Zahran vs. Cleary Appeal No. 97-3813 & 98-2122 and in support of their motion state as follows:

1. Appellants discovered misrepresentation, fraud, and inadequacy of counsel on about December 17, 1998 and immediately filed a motion to intervene and to file their own briefs to avoid injustices due to counsel's actions.

2. On 12/22/98, this Honorable Court granted Appellant's motion but did not give 30 days extension of time to file briefs from the date of returning files from Appellants' counsel and gave new dates for filing supplemental briefs directing Appellants to file their supplemental briefs, not to exceed 7,000 words by January 4, 1999 in Appeal No. 97-1712, January 11, 1999 in Appeal No. 97-3710 & 98-2123, and by January 19th in Appeal No. 97-3813 & 98-2122. See order dated 12/22/98

3. Appellant, Robin Zahran, upon receiving this Court's order on 12/29/98, travelled immediately to the U.S. District Court for the Eastern District of Wisconsin and took possession of the records on appeal connected with the three (3) appeals subject to the filing of supplemental briefs. See Copy of transmitted letter, Exhibit 1

4. The above appeal, 97-3710 & 98-2123, contains six (6) volumes of pleadings, 16 loose pleadings and 19 volumes of transcripts consisting of approximately 3,000 pages of court transcripts and four (4) boxes of papers and pleadings, excluding exhibits. The Appellants will be in dire need of the additional 11 days requested so they would be able to sift through the record and prepare facts and arguments especially where they will be preparing Appeal No. 97-1712 which is due on Jan. 4, 1999.

5. This Honorable Court denied Appellants' motion to direct Attorney Cohen to turn over the files to these Appellants on 12/30/98. Attorney Cohen is out of town and will not return until 1/4/99. See Exhibit 2

6. Attorney Cohen removed all of Appellants' files including their legal research, computer disks, and all their transcripts that were marked for the purpose of preparing the Appellants brief and statement of facts needed of which same would have been used.

7. Appellants, through the inspection of the volumes of the district court records, realized that 7,000 words would be inadequate to present a meaningful supplemental brief to deal with the issues especially where Attorney Cohen's original brief needed to be supplemented and did not include most of the important facts in the record nor raised the important arguments and would need a brief consisting of minimum of approximately 12,000 words to state the additional facts necessary to raise the important and relevant arguments.

8. Appellants are not asking for extension of time on appeal No.97-1712 which is due 1/4/99 as they will be putting all their time from now until 1/4/99 in preparation of that brief.

9. Appellants are not and will not request additional time to file Appeal No. 97-3813 & 98-2122 as they believe that they will be able to file it timely since they have three weeks to prepare.

10. Appellants, for the similar reasons as stated above, request that this Honorable Court allow them to file an oversized supplemental brief in No. 97-3813 & 98-2122 to include 12,000 words as it is clear that Attorney Cohen did not prepare much facts form the record which contains 9 volumes of transcripts approximately 1,500 pages and one box of volumes and pleadings of which these Appellants would need to read and prepare their statements of facts and arguments in order to submit a meaningful brief supported by facts and adequate legal arguments.

WHEREFORE, for the above stated reasons, Appellants pray that this Honorable Court grant them 11 days extension of time to file their brief in No. 97-3710 & 98-2123 and to file an oversized brief to the extent of 12,000 pages in Appeal Nos. 97-3710 & 98-2123 and Appeal No. 97-3813 & 98-2122

Dated: December 30, 1998

Respectfully submitted,

_____

Robin Zahran

_____

Karen Zahran

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 6, 1999

By the Court:

ROBIN ZHARAN and KAREN ZAHRAN,
Plaintiffs-Appellants,
No. 97-1712 v.
FRANKENMUTH MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

)
)Appeal from the United
)States District Court for
)the Eastern District
)of Wisconsin
)
) No. 90 C 337
)
) Thomas J. Curran,
) Judge
)

ROBIN ZAHRAN and KAREN ZAHRAN
Plaintiffs-Appellants,
97-3710 & 98-2123 v.
GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,
Defendants-Appellees

)Appeal from the United
)States District Court for
)The Eastern District of
)Wisconsin.
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) No. 95 C 334
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)Charles N. Clevert,
) Judge
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| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeal from the United )States District Court for )the Eastern District of |
| No. 97-3813 & 98-2122 v. | )Wisconsin. ) ) |
| CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED, | ) ) No. 93 C 543 ) ) |
| Defendants-Appellees | )Charles N. Clevert, ) Judge ) |

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The following is before the court:

1. **EMERGENCY MOTION FOR EXTENSION OF TIME BY 11 DAYS OR UNTIL JANUARY 22, 1999, IN APPEAL NO. 97-3710 & 98-2123,** filed on December 30, 1998, by counsel for appellants.

2. **EMERGENCY MOTION TO FILE AN EVERSIZED SUPPLEMENTAL BRIEF TO THE EXTENT OF 12,000 WORDS IN APPEAL NOS. 97-3710 & 98-2123 AND 97-3813 & 98-2122,** filed on December 30, 1998, by counsel for the appellants.

3. **PLAINTIFFS-APPELLANTS' MOTION TO FILE INSTANTER APPELLANTS SUPPLEMENTAL BRIEF,** filed on January 7, 1999, by counsel for appellants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs,
v.
CLEARY BUILDING CORPORATION and
RALPH UECKER & SONS, INC.,
Defendants.

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**AMENDED**
**ORDER GRANTING PLAINTIFF'S MOTION TO FILE AN "APPEAL" TO THE DISTRICT COURT OF THE TAXING OF BILL OF COSTS (DOC. #178) BY THE CLERK OF THE COURT AND ORDER SUSTAINING IN PART AND OVERRULING PLAINTIFFS' OBJECTIONS TO TAXATION OF COSTS**

On April 23, 1998, plaintiff Robin Zahran filed a motion for leave to appeal the costs taxed by the clerk of court on April 13, 1998, as follows:

**Bill of Costs of Ralph Uecker & Sons, Inc.**

| DISBURSEMENTS | PROPOSED | ALLOWED |
|---|---|---|
| Service of Process (see schedule A) | $219.00 | $219.00 |
| Witness fees (see schedule B) | $ 90.00 | $ 90.00 |
| Outside Records (see schedule C) | $ 56.06 | $ 56.06 |

| | | |
|---|---|---|
| Photocopies (see schedule D) | $954.79 | $954.79 |
| Court Reporter Fees (see schedule E) | $676.50 | $676.50 |
| TOTAL | $1,996.35 | $1,996.35 |

**Bill of Costs for Cleary Building Corporation**

| DISBURSEMENTS | PROPOSED | ALLOWED |
|---|---|---|
| Fees for service of subpoenas (Schedule A) | $ 176.02 | $ 176.02 |
| Court Reporter Fees for Trial Transcripts (ScheduleB0 | $1,761.72 | $1,761.72 |
| Fees for Witnesses (Schedule C) | $ 708.87 | $ 708.87 |
| Fees for copies of papers necessarily obtained for use in case (Schedule D) | $1,217.39 | $1,217.39 |
| In-House Photocopies (Schedule E) | $1,644.95 | $1,644.95 |
| Court Reporter Fees for Depositions. (Schedule F) | $1,310.45 | $1,310.45 |
| TOTAL | $6,819.40 | $6,819.40 |

Mr. Zahran claims that he failed to file a timely objection to the costs allowed by the clerk of court because he was away from his office in Oak Brook, Illinois when notice of the allowance arrived. Zahran asserts that there is no delivery of mail to his office on Saturdays and that he left Chicago on April 17, 1998, to visit his daughter who was hospitalized in Boston, Massachusetts. When he returned to his office on April 22, 1998, he opened two envelopes from the Clerk's Office. After first contacting a deputy clerk to state his intention to appeal, Mr. Zahran immediately filed this motion.

The essence of Mr. Zahran's motion is that this court should enlarge the time for him to object to costs and fees allowed by the clerk due to excusable neglect. Local Rule 9.03 provides as follows:

> A party may move for review of the clerk's decision taxing costs pursuant to Fed. R. Civ. P. 54(d) within (5) days from taxation. The motion, supporting papers and scheduling shall conform to Local Rule 6.01.

After considering the affidavits of Robin and Karen Zahran supporting the motion and the record, the court concludes, in the interest of justice, that relief should be granted. Mr. Zahran contested the bill of costs filed by defendants Ralph Uecker and sons (Uecker) and Cleary Building Corporation (Cleary), and filed two briefs in support of his position. Moreover, he expeditiously filed the instant motion and affidavits after learning that costs were taxed by the clerk. Lastly, the court is not aware of any prejudice resulting from the tardy submission of that instant motion.

The court now turns to the substance of the Zahrans' "appeal" as gleaned from Plaintiffs' Reply to Defendants Uecker and Sons, Inc., Bill of Costs. The Zahrans claim that because Deborah L. Ciszewski is a paralegal rather than an attorney, the affidavit she filed in support of Uecker and Sons' bill of costs does not comply with Fed. R. Civ. P. 11.

> Ciszewski's affidavit states:
> "Deborah L. Ciszewski, being first duly sworn on oath, says that she is an [sic] paralegal at Hinshaw & Culbertson for the defendant Ralph Uecker & Sons, Inc., in this action, and that the disbursements within

> mentioned have been or will be necessarily made and the copies charged for in the within bill of costs were necessarily obtained for use in this action."

A party seeking costs must fulfil the requirements of 28 U.S.C. § 1924: "Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed." It is clear that Ciszewski filed her statement as an employee of Hinshaw & Culbertson, and agent of Uecker, attesting that the disbursements mentioned have been or will be paid, and were necessarily incurred of ruse in this action. Thus, it fully complies with Local Rule 9.01. Moreover, it is not a statement within the ambit of Fed. R. Civ. P 11. This objection is denied.

I also reject the Zahrans' claim that Uecker's bill of costs is untimely under Local Rule 9.01. This rule give a party receiving a favorable judgment for costs fifteen days from the entry of judgment to serve the adverse party and to file with the clerk the bill of costs. However, post-trial motions change this requirement. Local Rule 9.01 states: "If a timely motion for a new trial or amendment of judgment has been made pursuant to Fed. R. Civ. P. 59, time for filing the bill of costs shall commence to run from the entry of the order granting or denying such motion."

Judgment was entered in favor of defendants, Uecker and Cleary, on November 18. 1996. On December 3, 1996, the Zahrans filed a motion asking for judgment notwithstanding the verdict, declaration of a mistrial, or a new trial. Uecker's bill of

costs was filed January 3, 1997, prior to denial of the Zahrans' post-verdict motions. Hence, the bill of costs was timely filed.

As a further objection to Uecker's bill of costs, the Zahrans contend that the sum of $219.00 claimed for service of process represents fees claimed on behalf of a private detective agency to which there was no proof of payment. Alternatively, they contend that the $219.00 is a witness fee paid to Patrick Harmon, a person living more than 100 miles from this court, that a copy of the subpoena was not included with the bill of costs, and that Harmon's testimony was unnecessary and in bad faith.

Uecker does not respond to the Zahrans' argument regarding its use and payment of a private detective agency to serve Patrick Harmon. Instead it states that there is no need to file a copy of Harmon's subpoena, and that the distance between Milwaukee, Wisconsin, and Schaumburg, Illinois, is approximately 100 miles.

Although neither party cites any authority, I take judicial notice that the distance between Milwaukee and Schaumburg is 82 miles. Moreover, I am mindful of the Seventh Circuit's decision in Collins v. Gorman 96 F.3d 1057, 1060 (7th Cir. 1996), permitting the prevailing party to recover service costs that do no exceed the marshal's fees, no matter who actually effected the service. In addition, I have not been shown any reason to conclude that Harmon's testimony was irrelevant in this case or that Uecker acted in bad faith in issuing the subpoena for Harmon to appear. Furthermore, Uecker provided an invoice for its private process server. Consequently, costs will be allowed for service of process in the amount of $93.30 (Marshal's service rate of $40.00, plus mileage of $53.30 for 164 miles at .325 cents per mile) and the

Zahran's objection to service fees will be sustained in part. On the other hand, the objection to Harmon's appearance fee will be denied.

The Zahran's claim they provided Uecker with D.H.I.A. records, and that it was unnecessary for Uecker to obtain duplicates at a cost of $33.00. Uecker's response indicates that the records it obtained for the plaintiffs were disorganized and incomplete. The Zahrans did not refute this contention. Therefore, I conclude that the D.H.I.A. records Uecker obtained were necessary in the interest of completeness and economy. This allowance will be sustained. The Zahrans have failed to show any entitlement to D.H.I.A. records, or specific prejudice suffered from an alleged failure to disclose these records that would preclude recovery of reasonable costs necessarily incurred by Uecker to obtain them.

The objection to allowance of $20.06 for Miller Clausen records from a previous lawsuit is without any factual support in this record and is rejected. The same is true of the contention that a $3.00 photocopy expense incurred at the Marquette University Law Library is not a taxable cost. Such costs are clearly allowable under 28 U.S.C. § 1920(4) (fees for exemplification and copies of papers necessarily obtained for use in a case are allowable by the clerk.) See Haroco v. American Bank and Trust of Chicago, 38 F.3d 1429, 1441 (7th Cir. 1994).

With respect to photocopy costs, the Zahrans assert that they are unable to make "heads or tails" of them except for Uecker's in-house rate of 0.23 cents. However, they go on to state that there is no invoice for $383.87 and suggest that copy costs of $33.00 appear to have been billed twice. Uecker responds by stating that the Zahrans have failed to provide

documentary evidence of what a "normal charge" for copying is in the greater Milwaukee area to show that its copy costs are not recoverable generally.

When a district is determining the allowable costs to award for photocopies, the Seventh Circuit, citing its earlier decision in Martin v. United States, 931 F.2d 453, 455 (7th Cir. 1991), stated that "charges for in-house reproduction may not exceed the charges of an outside print shop." Haroco Id. Despite Ueckers claim to the contrary, the Zahrans state that they believe copy costs in the Milwaukee area range form .05 cents to .07 cents.

Based on these contentions and my familiarity with prices charged by outside print shops in the area, I will sustain the Zahrans' objection to Uecker's copy costs in part, and allow .10 cents per page for copies, with a total copy cost of $414.13, instead of the $954.79 allowed by the clerk,

The Zahrans' final objection to Uecker's costs is for court reporter fees in the amount of $626.40, resulting from their depositions and the deposition of Kevin Voss. According to the Zahrans, condensed deposition transcripts are not taxable; there is no proof that the reporter's bill was paid; the depositions were not necessary; and the court reporter appearance fees do not correlate to actual production of transcripts.

Local Rule 9.02(b) specifically allows for the recovery of deposition costs that are necessarily incurred. It provided:

> The court reporter's charge for the original of a deposition, if paid by the taxing party, and the taxing party's copy are taxable if the deposition was reasonably

> necessary for use in the case, whether or not it was used at trial. Reasonable expenses of the reporter, the presiding notary or other official and postage costs for sending the original deposition to the clerk for filing are taxable.

This rule is an extension of 28 U.S.C. § 1920(2) which permits the taxation of "[f] ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case". That Uecker obtained a condensed copy of the transcript at the cost of $7.40 does not affect entitlement to recovery of this expense. Hence, the Zahrans' challenge to the allowability of reporter's fees, including the appearance fee, is to no avail. Even so, this cost may not be approved unless it is "reasonably necessary for use in the case."

There is no evidence in this record challenging Deborah Ciszewski's affidavit, filed in support of the request of recovery of reporter fees, stating that the invoice had been or would be paid. Moreover, I am satisfied that it was necessary for Uecker to preserve the Zahran's testimony and the testimony of the witnesses subpoenaed for trial. Thus, the Zahrans' objection to payment of court reporter fees and costs must be rejected.

The Zahrans' objection to the allowance of Cleary's bill of costs parallels their objection to Uecker's bill of costs. They claim that Cleary failed to follow procedure and did not properly support its claim because Nancy Stanton, a paralegal employed by Cleary's counsel, is not a licensed attorney. The Zahrans further contend that the bill of costs was not timely filed. For the reasons stated with respect to Uecker, these objections are without merit. I likewise reject the Zahrans' contention that private process service fees in the amount of $176.02 are not recoverable.

In addition to claiming that private process service fees are not payable, the Zahrans object to the allowance of service fees for specific witnesses. They assert that Marsha Howard, who is with the Wisconsin Dairy Herd Improvement Program (D.H.I.A.), had no specific knowledge of their business of their herd records outside of D.H.I.A. reports archived in her office. Next, they contend that they paid witness fees for Dr. Lyle Holschback to appear and that Cleary did not requi4e Holschback to actually testify at trail. The service fee for Glenn Martin is objected to because he was not called to testify and could only state that he signed a contract with the Zahrans to raze their barn, a matter allegedly stipulated to by the Zahrans at all times. Brian Wordell's service is objected to because the Zahrans state they subpoenaed him to attend the trail on two dates and he, and the aforementioned witnesses, never received their subpoenas from Cleary.

In response to these objections, Cleary points out that the trial was rescheduled several times and that multiple subpoenas were issued. This is verified by the docket which shows that the trail was moved, thereby requiring the issuance of multiple subpoenas. Therefore, if Cleary incurred service fees for witnesses who subsequently appeared for the Zahrans, Cleary is not barred from recovering its expense. Moreover, a witness is entitled to payment of fees for being available to testify even though the witness is not actually called. 28 U.S.C. § 1821. Subsection (d) (1) of § 1821 authorizes payment of a subsistence if an overnight stay is required because it is impracticable for a witness to return home; and subsection (2) restricts the payment to an amount not to exceed the maximum per diem allowance prescribed for official Federal Government travel in the area by the Administrator of the General Services Administration. Accordingly to regulations promulgated

pursuant to title 5 §5702(a), the maximum per diem for Milwaukee, Wisconsin, on December 26, 1995, was $97.00, and for November 12, 1996, $100.00. It follows that subsistence for Warren Shaw is limited to $100.00 and for Kevin Voss is limited to $104.25 ($97.00 for room and food plus $7.25 for parking) Phone calls by Shaw costing $14.70 are not reimbursable.

The Zahrans assert that Cleary's trial transcript costs of $1,761.22 re at best, nothing but an attempt to increase the costs of litigation at their expense. They assert that they supplied Cleary with copies of all proceedings in Case Nos. 91-C808 and 90-C-337; that Attorney Michael Aldana was given the transcript prepared by the official court reporter; and that the transcript of final arguments, and floppy disks of this trial record, are not reimbursable.

Cleary, in turn, submits that the Zahrans supplied them with five boxes of documents which did not include trial transcripts. However, it does not refute the April 19,. 1994, letter of Attorney Michael Aldana indicating that he received Volumes II, III, IV, VI, and VII of Zahran v. Frankenmuth Mutual Insurance Company, Case No. 91-C-808, or deny the accuracy of the April 24, 1994, letter of Attorney Douglas Morrison (ex 4, Doc. No. 151, Plaintiff's Reply to Cleary Building Reply to Plaintiff's Opposition of Cleary's Bill of Costs) indicating that Attorney Aldana returned five volumes of trial transcripts on April 22, 1994. Nor does it show why ASCII disks of the trial record in Case No. 91-C-808 were anything more than a convenience. Consequently, the Zahran's objection to these costs will be sustained on the ground that Cleary has not satisfactorily shown these costs to be necessary.

There are twenty objections of costs of $1,217.39 claimed by Cleary and allowed by the clerk for copies of papers obtained for use in the case. The Zahrans' suits against Frankenmuth Insurance relates to the facts and circumstances at issue in this case. Thus, I find no merit to the Zahrans' contention that the $4.00 cost of copying the judgment docket in the clerk's office is not recoverable.

Turning to the Zahran's objection to costs for copies made at Econoprint on April 18, 1994, in the amount of $55.97, and $352.86 on August 3, 1994, I find that the first expense is not explained in any way , and that the second appears to be for duplicate copies of documents sent by Cleary to Continental Casualty. Defense of this case did not require Cleary to prepare duplicates for its insurer. Hence, this objection will be sustained.

I will also sustain the Zahran's objection to Cleary's expenses for alleged extra copies of D.H.I.A. reports costing $34.00, and Reedsville Veterinary Associates records costing $12.10. Cleary did not refute Robin Zahran's affidavit (ex 2, Doc 151) stating that all copies of these documents were supplied for the period from 1988 to 1993.

Whether was a key in this case, and the Zahran's objection to expenses for obtaining climatological and agricultural data is without foundation. Brown County is adjacent to Manitowoc County where the Zahran's farm is located, so that climatological data fro WI/Green Bay, obtained by Cleary from the National Oceanic and Atmospheric Administration was clearly necessary and relevant. The fact that the report does not specifically mention Manitowoc goes to the weight of this evidence.

It was also reasonable and necessary for Cleary to prepare photographic and power point evidence for use at trial. Thus, objections to these costs cannot be sustained. On the other hand, there is not clear evidence why Cleary needed driver's license abstracts for Elmer Weiss and Ed Gracylany. Hence, the Zahran's objection to these expenses in the sum of !18.55 will be sustained.

Cleary's in-house copy costs in the sum of $1,644.95 are objected to on the ground that they have not been explained with specificity as required by 28 U.S.C. § 1920(4). This objection will be sustained. Cleary does not know what was copied, and it includes copies made before the start of this litigation. The fact that copies were made after trial is not fatal, since it is clear that Cleary has been involved in post-verdict disputes. Nevertheless, Cleary has failed to establish its per page costs, or to show that this expense was reasonable and necessarily incurred.

I reject the Zahrans' objection to costs for depositions and transcripts for the reasons applicable to similar objections discussed above. It was prudent for Cleary to take the Zahran depositions. Indeed, it would have been shocking if it had failed to do so. Cleary's expense for taking Dr. Voss' video deposition for use at trial was also reasonable and was not merely incurred as a matter of inconvenience.

Lastly, I note that Robin Zahran, has asked to be compensated at the rate of $150.00 per hour, for a total of $6,000.00, for more than forty hours of his time taken away from his work to reply to Cleary's bill of costs, claiming that Cleary's bill of costs was unreasonable and filed in bad faith. Although I have sustained some of the Zahran's objections to Cleary's claim, I do not find that Cleary has acted unreasonably

or in bad faith. Therefore, Robin Zahran's request is rejected, In view of the forgoing,

**IT IS ORDERED** that the Zahrans' objections to the allowance of costs to Uecker and Cleary are sustained in part, and overruled in part, and that costs are allowed or disallowed as set forth below:

**Bill of Costs of Ralph Uecker & Sons, Inc.**

| Disbursements Proposed | | Disallowed by Judge Clevert | Allowed by Judge Clevert |
|---|---|---|---|
| Service of Process (schedule A) | $ 219.00 | $125.70 | $ 93.30 |
| Witness fees (schedule B) | $ 90.00 | $ 0.00 | $ 90.00 |
| Outside Records (schedule C) | $ 56.06 | $ 0.00 | $ 56.00 |
| Photocopies (schedule D) | $ 954.79 | $540.66 | $ 414.13 |
| Court Reporter Fees (schedule E) | $ 676.50 | $ 0.00 | $ 676.50 |
| TOTAL | $1996.35 | $666.36 | $1329.99 |

**Bill of Costs by Cleary Building Corporation**

| Disbursements Proposed | | Disallowed by Judge Clevert | Allowed by Judge Clevert |
|---|---|---|---|
| Service of Process (schedule A) | $ 176.02 | $ 0.00 | $ 176.02 |
| Court Reporter Fees (schedule B) | $1761.72 | $1761.72 | $ 0.00 |

| | | | |
|---|---|---|---|
| Witness Fees (schedule C) | $ 708.87 | $ 217.22 | $ 491.65 |
| Fees for Copies of Papers Necessarily Obtained for Use in Case (schedule D) | $1217.39 | $ 473.48 | $ 743.91 |
| In-House Photocopies (schedule E) | $1644.95 | $1644.95 | $ 0.00 |
| Court Reporter Fees for Depositions (schedule F) | $1310.45 | $ 0.00 | $1310.45 |
| TOTAL | $6819.40 | $4097.37 | $2722.03 |

Dated at Milwaukee, Wisconsin, this 22nd day of February, 1999.

BY THE COURT

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C.N. CLEVERT
U.S. District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) |
| No. 97-1712 v. | )Appeal from the United )States District Court for )the Eastern District of )Wisconsin |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | ) No. 90 C 337 ) Thomas J. Curran, ) Judge |

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|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | ) |
| 97-3710 & 98-2123 v. | )Appeal from the United )States District Court for )The Eastern District of )Wisconsin. |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | ) No. 95 C 334 ) Judge C. Clevert |

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| ROBIN ZAHRAN and KAREN ZAHRAN, | ) |

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| | )Charles N. Clevert |
| V. | )Judge |
| | ) |
| CLEARY BUILDING and | ) |
| UECKER AND SONS, | )Appeal No. 97-3813 |
| | ) and 98-2122 |

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**PLAINTIFFS-APPELLANT'S MOTION TO MOVE THE COURT AND HONORABLE JUDGES BAUR, FLAUM, AND KANNE TO TRANSFER THE FOLLOWING APPLELLANTS' APPEALS DISPOSITION TO ANOTHER CIRUCIT FOR RULING OR IN THE ALTERNATE FOR THE ABOVE NAMED JUDGES TO ABSTAIN FROM PARTICIPATING IN THE DETERMINATION OF THESE APPEALS DUE TO PRIOR DISCLOSURE**

NOW COMES the Appellants, Robin Zahran and Karen Zahran, appearing pro-se and move this Honorable Court and the Honorable Judges Bauer, Flaum, and Kanne to transfer the above named appeals to another U.S. Circuit Court of Appeals for disposition and rulings or in the alternate, for the abstaining of the above named judges from participating in the panels that would assume the duty of the determination of these appeals and in support of their motion appellants state as follows:

1. The above panel participated in rulings in previous appeals appealed to this court by these appellants and on September 17, 1998, issued an order sanctioning these appellants and in fact criticised them for not accepting an adverse judgement of which these appellants believe that they did not receive justice either in the district court or the appeal court.

2. The appellants further believe that as human beings, we may create perceptions in our minds that are hard to erase or dismiss referencing certain impressions of certain things or people and we may develop perceptions that effect our subconscious in how we look at certain persons or things or how we rule on them, and in line of the disclosure of this panel on 9/17/98 and its orders over the years, and in particular, the 9/17/98 orders referencing these appellants and their appeals and due to the seriousness of these appeals referencing these appellants, appellants pray this Honorable panel of judges abstain from participating in the determination of these appeals and to assign these appeals to another U.S. Circuit Court of Appeals for adjucation on the merits.

Appellants are making this motion upon all the circumstances, comments of the above panel referencing these appellants and pursuing to F.R.C.P. that all pleadings are construed to do justice and in no way are attacking the personal integrity of any of the judges named above.

Dated: 3/1/99

Respectfully submitted,

_____

Robin Zahran

_____

Karen Zahran

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
March 4, 1999

By the Court:

| | | |
|---|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) | |
| No. 97-1712 v. | ) | Appeal from the United States District Court for the Eastern District of Wisconsin |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | ) | No. 90 C 337 |
| | ) | Thomas J. Curran, Judge |

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| | | |
|---|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | ) | |
| 97-3710 & 98-2123 v. | ) | Appeal from the United States District Court for The Eastern District of Wisconsin. |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | ) | No. 95 C 334 |
| | ) | Judge C. Clevert |

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| | |
|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) |
| | )Appeal from the United |
| | )States District Court for |
| | )the Eastern District of |
| No. 97-3813 & 98-2122 v. | )Wisconsin. |
| | ) |
| CLEARY BUILDING CORPORATION, | ) |
| | ) No. 93 C 543 |
| Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED, | ) |
| | ) |
| Defendants-Appellees | )Charles N. Clevert, Judge |

Upon consideration of the **PLAINTIFFS-APPELLANTS' MOTION TO MOVE THE COURT AND HONORABLE JUDGES BAUER, FLAUM, AND KANNE TO TRANSFER THE FOLLOWING APPELLANTS' APPEALS DISPOSITION TO ANOTHER CIRCUIT FOR RULING OR IN THE ALTERNATIVE FOR THE ABOVE NAMED NOS.** 97-1712, 97-3710, 98-2123, 97-3813 & 98-2122

**JUDGES TO ABSTAIN FROM PARTICIPATING IN THE DETERMINATION OF THESE APPEALS DUE TO PRIOR DISCLOSURE,** filed on March 1, 1999, by the prose appellants,

**IT IS ORDERED** that #1 is **DENIED.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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ROBIN ZAHRAN and
KAREN ZAHRAN
Plaintiffs,

v. Case No. 93-C-0543

CLEARY BUILDING CORPORATION
and RALPH UECKER & SONS, INC.,
Defendants.

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ORDER DENYING PLAINTIFFS' MARCH 4, 1999 MOTION SEEKING RECONSIDERATION OF THIS COURT'S ORDER OF FEBRUARY 22, 1999

The court has considered the plaintiffs, motion of March 4, 1999, seeking reconsideration of the AMENDED ORDER GRANTING PLAINTIFFS' MOTION TO FILE AN "APPEAL" TO THE DISTRICT COURT OF THE TAXING OF BILL OF COSTS (DOC. #178) BY THE CLERK OF THE COURT AND ORDER SUSTAINING IN PART AND OVERRULING PLAINTIFFS' OBJECTIONS TO TAXATION OF COSTS filed February 22, 1999. After review of the motion, the court finds that is either duplicative or without merit.

Now, therefore, the plaintiffs' motion is denied.

Dated at Milwaukee, Wisconsin, this 5th day of March, 1999

BY THE COURT

C.N. CLEVERT
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
OFFICE OF THE CLERK

SOFRON BL NEDIKSLY
CLERK

362 U.S. COURTHOUSE
517 E. Wisconsin Ave.
Milwaukee, WI 53202

RECORD TRANSMITTAL LETTER
March 29, 1999

Mr. Gino J. Agnello, Clerk
United States Court of Appeals
Seventh Circuit
219 S. Dearborn St.
Chicago, IL 60604

RE: **Zahran v. Cleary Bldg Corp. et al.**
**USCA No.: 98-2122. 99-1618**
**USDC No.: 93-C-543**

Dear Mr. Agnello:

Enclosed herewith please find the record on appeal in connection with the above-referenced case consisting of:

[2] Volumes of pleadings
[7] Loose pleadings
[9] Volumes of transcripts
[2] Exhibits - 3 boxes
[ ] Volumes in camera materials
[ ] Other

Please acknowledge date of receipt of the above referenced materials on the enclosed copy of this letter.

Very truly yours,

SOFRON B. NEDILSKY

Clerk, U.S. District Court

By

Holly Vila
Deputy Clerk, Appeals

Enclosure
cc: Robin Zahran,
Edward Hannan, Tomislav Kuzmanovic

MISSING DOCUMENTS

| | | |
|---|---|---|
| #68: | 8/15/95 | Order re-assigning case to Mag Judge Callahan |
| #80: | 1/16/96 | Brief in Opposition by deft Cleary |
| #81: | 1/16/96 | Motion in limine from deft Cleary |
| #107: | 10/31/96 | Response to deft's motion in limini |
| #108: | 10/31/96 | Response to deft's motion in limini |
| #135 | 12/3/96 | Motion by pltfs to extend time |
| #146 | 1/17/97 | Objections by pltfs to deft Ralph Uecker's Bill of Cost |
| #178 | 4/23/98 | Motion by ptlfs for leave to file an appeal |

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

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MOTION FOR DISQUALIFICATION FO THE HONORABLE JUDGES, BAUER, FLAUM, AND KANE FROM PARTICIPATING IN VOTING ON APPELLANT'S BRIEF FOR REHEARING INBANK

NOW COMES ROBIN ZAHRAN and KAREN ZAHRAN, plaintiffs-appellants and move the above named Honorable Judges to disqualify themselves from participating in voting on Zahran's petition for Rehearing in Banc in the following appeals for the reasons stated in the attached statement: Exhibit 1

1. USCA No.: 97-1712
Robin Zahran and Karen Zahran, Plaintiffs-Appellants,
v.
Frankenmuth Mutual Insurance Co.,
Defendant-Appellee.
2. U SCA No.: 97-3710 & 98-2123
Robin Zahran and Karen Zahran, Plaintiffs-Appellants,
v.
Gerald Schmidt, Marjan Kmiec, Robert Burrell, et. al.,
Defendants-Appellees
3. USCA No.: 98-2122, 99-1618
Robin Zahran and Karen Zahran, Plaintiffs-Appellants,
v.
Cleary Bldg Corp., et al, Defendants-Appellees.

Respectfully submitted,

Robin Zahran Karen Zahran

## *EXHIBIT 1 ATTACHED TO MOTION TO DISQUALIFY PANEL

Robin Zahran and Karen Zahran are filing a complaint referencing the Panel of the Circuit Court Judges, William Bauer, Joel Flaum, and Michael Kanne. Zahrans believe the panel engaged in the prejudicial administration of the business of the courts, by being bias against Zahrans, demonstrated by the ruling which misapply the law, the US Constitution, the Laws and the rules of the Appellate procedures, and the Federal Rules of Civil Procedures, including the assignment of cases and the non complete review of Zahrans' appeal briefs as mandated by the law and the US Constitution, and the disclosure of the intention to rule against Zahrans prior to seeing appellant briefs.

## STATEMENT OF FACTS

### BACKGROUND

Robin Zahran and Karen Zahran were litigants in one complaint against their previous insurance company, and due to the mishandling and negligence of their previous lawyers, the one case and possibly one appeal mushroomed to multiple cases and multiple appeals with enormous costs, and repercussions making Zahrans look like constant litigants, tot he point where the circuit panel disregards automatically Zahrans' right to seek justice, or review the lower courts decisions, as was told to Zahran's by their last attorney, Andy Cohen.

Zahrans filed an action against their lawyers for malpractice and for breach of contract in the US District for the Eastern District of Wisc. The District Court ruled against Zahran's and denied them a jury trial.

On appeal, a panel of Honorable Judges, Flaum, Kanne and Bauer ruled on one of the cases appealed by Zahrans and filed by their attorney, Andy Cohen on Sept. 17, 1998.

Zahrans, who at the appeal stage, were represented by Attorney Andy Cohen, and at the district court level by Attorney John Bickley, who represented Karen Zahran throughout, and represented Robin Zahran for a period of time.

Attorney Cohen informed Zahrans in September of 1998 that he was told by an attorney on the staff of the circuit panel, that the panel directed their staff attorneys to draft and enter orders automatically against Zahrans on any of their pleadings and appeals, and to bring all Zahrans' appeals and motions before the same panel for final approval of the orders referencing Zahrans, as already has been determined.

Zahrans requested from Attorney Cohen to file a complaint with Honorable Chief Judge Posner. Cohen said he would but in fact did not. Zahrans discussed in detail with Attorney Cohen as to how could they get a meaningful review of their appeals, in lieu of the standing direction by the panel to rule on all Zahrans' appeals and automatically rule against Zahrans, and get rid of them. It was therefore agreed by Cohen and Zahrans to move for disqualification of the panel on numerous grounds among which is prejudice, and disclosure of the panel before assignment, the disclosure of the panel pursuant to rules of the circuit court on assignment of cases, and the demonstrated prejudice, bias and state of mind of the panel judges and their staff against Zahrans.

At a later date, Attorney Cohen informed Zahrans that he filed that motion, and at a later time, Zahran's asked for a copy. Cohen replied that he lost it and will get a copy from the appeal court clerk, of which he never did. Zahran called the office of the clerk who notified Zahrans there was no such motion. When Zahran asked Cohen why did he not tell the truth, Cohen asked of Zahrans will allow him to withdraw.

Zahrans had a condition of retention with Attorney Cohen, which was agreed upon, that he was to show Zahrans his final drafts of the briefs before he files them for their review

and comment. He filed the first brief without showing it to Zahrans and omitted the most relevant issue from Zahrans' appeal. The panel immediately ruled against Zahrans, and dismissed the appeal and issued sanctions.

Attorney Cohen was to move for reconsideration but never did. The time passed and after discussion stated he will go to the Supreme Court for injunction and make a motion, due to the above infractions, which he did not properly file as the Supreme Court refused his filings because he was not admitted.

On or about Dec. 3, 1998, Attorney Cohen called Zahrans and asked for help in the preparation of the last two briefs. Zahran's put every thing aside and made themselves available to help Cohen, who as of that date had not done much on the briefs with the malpractice matter in Schmidt Appeal #97-03710 & 98-2123, and prepared a superficial brief in the Cleary matter Appeal # 97-3813 & 98-2122, in which he agreed it was not good, and had to be rewritten.

Zahrans did everything to help and asked Attorney Cohen to make sure he raises all issues in the appeals including the district court refusal of Zahran's demand, among other issues, for a jury trial but it was later on Zahrans learned Cohen did not raise all the issues, and in fact Cohen filed a very poor brief. Nor did Attorney Cohen show Zahrans the briefs until after they were filed by sending copies on Dec. 19, 1998. He kept Zahrans' case files, transcripts and left town on vacation, until Jan. 4, 1999. Without responding to Zahran's motion, he filed a motion to withdraw. Zahran's never received a ruling on that motion.

Through this period, between Sept. 20, and Dec. 14, 1998, Attorney Cohen informed Zahrans it was of no use to write and spend much time to write a meaningful appeals briefs, as the panel was already predisposed to making adverse determination an to rule against Zahrans in these appeals. Pursuant to his personal knowledge, from the staff and other

communications, "I know". He stated there was communication with the opposing attorneys throughout the history of the litigation with you. Zahran demanded that Cohen bring a motion and tell the entire court of his knowledge, he refused by stating he is not going to wreck his career or alienate the panel against him with other cases as he practices before the court. Further, he stated the panel is bias and prejudice against Zahrans and stated, "they don't like you," and they will find a way to rule against you, although all the cases have very strong arguments in law and facts to support them.

Zahrans moved the court to submit their supplemental brief on Dec. 18, 1998, due to fraud and misrepresentation by Attorney Cohen, his refusal to follow on what the informed Zahran's and other acts.

The court granted Zahrans' motion to file their Supplemental Brief on 12/22/98. On Dec. 28, 1998 and after Christmas, Zahrans received the order through US Mail, and because the court refused to direct Attorney Cohen to turn over Zahran's files over so that they write their briefs, Robin Zahran went to the US District Court in Milwaukee and picked the files from the district courthouse and pursued to personally prepare 3 supplemental Appeal briefs referencing the Schmidt, Appeal 97-3710 & 98-2123, Cleary Building Appeal, 97-3813 & 98-2122, and Frankenmuth, 97-1712, as was directed by the court.

During this short time period, the Cook County Public Library was closed over New Years Weekend, Robin Zahran broke his tooth bridge, and was ill with a cold and bronchitis at the time. He was 2 days late in filing his supplemental brief in appeal #97-1712. The court denied his motion to file Zahrans' brief instanter which Zahran only had approximately 7 days to prepare from the date of knowledge of being allowed to file a Supplemental Brief. Zahran moved to reconsider explaining with specificity the reasons but the court denied the motion to file their brief.

Then referencing Appeal # 97-3817, Robin Zahran was late 5 minutes to file Zahran's brief. On Jan. 12, 1999 and at 9:05 a.m., Robin Zahran was in the clerk of the court's room. There was a snow storm that day which delayed Robin Zahran 5 minutes in reaching the room of the clerk of the courts. The court denied the motion to file Zahrans' Supplemental Brief. Zahrans moved the court to reconsider based on specific reasons outlined in their motion but the court denied again.

Zahrans, later after the briefs were filed, moved the court for disqualification of the panel, along with Zahran's motion to transfer to a different circuit. The motion was denied. Zahrans believe the denial was due to prejudice developed by the panel over the years against them and their perception of Zahrans as litigants. The panel have no idea of Zahrans' truthfulness, sincerity and of the damages sustained by Zahrans. The court, as of now, has not ruled on the motion of disqualification, but denied the transfer to another circuit.

The Appellees' brief were late in being filed contrary tot he written court orders, but the court held Zahrans to be responsible to the deadline although did not give them enough time to start with, and did not allow Zahrans to file their brief for being even five minutes late, but the court allowed the other parties' filing a day late. Zahran moved to strike their briefs for being untimely, explaining the written order and their own experience but no order on that motion was rendered by the court. And under the circumstances, Zahran's did a miracle in finishing two meaningful supplemental briefs in a period of 15 days without their file or previous research papers, but the court refused these briefs, being ill and without their files and transcripts held by attorney Cohen, who was on vacation. The court denied Zahrans to direct Attorney Cohen to turn over the files. These types of orders though out the last 9 years is what multiplied the litigation, instead of one case to more than ten, of which Zahran's and their family are the ones who paid the price

and suffered the disastrous effects on the justice system, contrary to the spirit of the moral and legal justice code.

On or about April 5, 1999, Zahrans received a letter from the District Court that they just sent the record on appeal in appeal # 97-3710 to the Seventh Circuit court on 3/30/99, consisting of the files of 20 volumes of transcripts and 3 exhibits boxes of documents, and 16 loose pleadings, and 6 volumes of pleadings.

On 4/14/99, the panel issued its decision and order affirming the district court's decision for the reasons stated in their unpublished order by relying on the briefs and the record. Under the circumstances and information stated, Zahrans don't believe that the panel reviewed their appeals briefs properly or the record nor applied the rule or the law pursuant to the statues, and believe that the panel in fact deprived them of their rights to due process, and justice through bias and prejudice. The panel of judges denied Zahrans a meaningful review of their appeals under the circumstances especially were their appeals are ruled upon before they reach the court, and with so much preconceived thoughts, and communications by staff with opposing parties.

Zahrans are citizens, human beings, and are right in their pursuit of justice and truth. Denying them justice is wrong and hopefully this Honorable Judge take that matter due to its' seriousness and effect on the administration of justice and society and investigate it fully due to the destruction of such happenings which effects peoples lives.

Dated: April 22, 1999

Respectfully submitted,

Robin Zahran

Karen Zahran

JUDICAL COUNCIL OF THE SEVENTH CIRCUIT
COMPLAINT OF JUDICAL MISCONDUCT OR DISABILITY

COMPLAINT FORM

[It is to be two pages, printed on one-side only.]

MAIL THIS COMPLETED FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, 219 SOUTH DEARBORN STREET, CHICAGO, ILLINOIS 60604. MARK THE ENVELOPE "JUDICAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.

SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED.

1.) Complaint's name Robin Zahran and Karen Zahran
Address: 718 Acorn Hill Lane
Oakbrook, Illinois 60523
Daytime telephone: (630) 573-1000

2.) Judge Complained about:
Name: Honorable Judges: Bauer, Kanne and Flaum
Court: United States Seventh Circuit court of Appeals

3.) Does this complaint concern the behavior of the judge in a particular lawsuit or lawsuits? (Complaints may not be directly related to the merits of a decision or procedural ruling.)

[XX] Yes [ ] No

If "Yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court:
Docket Number:

Are (were) you a party or lawyer in the lawsuit?

[XX] party [ ] lawyer [ ] neither



If a party, give the name, address, and telephone number of your lawyer:

previous lawyer, Andrew M. Cohen, 8 S. Michigan Ave. (312) 460-8785.

List docket numbers of any appeals to the Seventh Circuit: Cleary 98-2122, 99-1618, Schmidt 98-2123, 97-3710, Frankenmuth 98-1905, 97-1712

4.) Describe the conduct or evidence of disability that is the subject of this complaint. See rule 2(b) and (d). If you need more space, use sheets of paper the same size as the complaint form.

See attached complaint.

I declare under penalty of perjury that –

(1) I have read Rules 1 and 2 of the Rules of the Judicial council of the Seventh Circuit Governing complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

Signature Robin Zahran, Karen Zahran

Date executed 4/22/99

Page 2 of 2

## *COMPLAINT

Robin Zahran and Karen Zahran are filing a complaint referencing the Panel of the Circuit Court Judges, William Bauer, Joel Flaum, and Michael Kanne. Zahrans believe the panel engaged in the prejudicial administration of the business of the courts, by being bias against Zahrans, demonstrated by the ruling which misapply the law, the US Constitution, the Laws and the rules of the Appellate procedures, and the Federal Rules of civil Procedures, including the assignment of cases and the non complete review of Zahrans' appeal briefs as mandated by the law and the US Constitution, and the disclosure of the intention to rule against Zahrans prior to seeing appellant briefs.

### STATEMENT OF FACTS
### BACKGROUND

Robin Zahran and Karen Zahran were litigants in one complaint against their previous insurance company, and due to

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*Note: The facts in this complaint are supported by the record which is on file in this court and if the Honorable Judge Posner would like to see the supporting record he could either refer to the record, or request from us to produce them, and we would reply and produce them immediately.

the mishandling and negligence of their previous lawyers, the one case and possibly one appeal mushroomed to multiple cases and multiple appeals with enormous costs, and repercussions making Zahrans look like constant litigants, tot he point where the circuit panel disregards automatically Zahrans' right to seek justice, or review the lower courts decisions, as was told to Zahran's by their last attorney, Andy Cohen.

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preconceived thoughts, and communications by staff with opposing parties.

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Dated: April 22, 1999

Respectfully submitted,

Robin Zahran

Karen Zahran

**UNITED STATES COURT of APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
**JUDGMENT - WITHOUT ORAL ARGUMENT**

Date: June 21, 1999

BEFORE:

Honorable WILLIAM J. BAUER, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

Nos. 97-3813 and 98-2122

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs - Appellants

v.

CLEARY BUILDING CORPORATION, a Wisconsin corporation, and RALPH UECKER AND SONS, INCORPORATED,
Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 93 C 543, Charles N. Clevert, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

**UNITED STATES COURT of APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
June 21, 1999

*By the Court*:

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|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, Nos. 97-3813 and 98-2122 v. | )Appeals from the United )States District Court for )the Eastern District of )Wisconsin ) |
| CLEARY BUILDING CORP., a Wisconsin corporation, and RALPH UECKER AND SONS, INCORP. Defendants-Appellees. | )No. 93 C 543 ) )Charles N. Clevert, ) Judge |

The following is before the court:

1. **PLAINTIFFS-APPELLANTS' MOTION TO STRIKE CLEARY BUILDING REPLY BRIEF,** filed on March 1, 1999, by the pro se appellants.

2. **CLEARY BUILDING CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE CLEARY'S RESPONSE BRIEF,** filed on March 16, 1999, by counsel for the Appellee Cleary Building Corporation.

3. **RALPH UECKER & SONS, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE RALPH UECKER'S**

**RESPONSE BRIEF,** filed on June 14, 1999, by counsel for the Appellee Ralph Uecker & Sons, Inc.

**IT IS ORDERED** that #1 is **DENIED.**

**UNITED STATES COURT of APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
Submitted June, 1, 1999*
Decided June 21, 1999

UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53
*Before*

Honorable WILLIAM J. BAUER, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

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| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, Nos. 97-3813 and 98-2122 v. | )Appeals from the United )States District Court for )the Eastern District of )Wisconsin |
| CLEARY BUILDING CORP., a Wisconsin corporation, and RALPH UECKER AND SONS, INCORP. Defendants-Appellees. | )No. 93 C 543 )Charles N. Clevert, ) Judge |

**ORDER**

Robin and Karen Zahran are Illinois citizens whose Wisconsin dairy farm was damaged in 1989 and 1990, first by

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary and the appeal is submitted on the briefs and record. *See* Fed R. App. P. 34(a)(2).

high winds and later by several fires. for the last decade, they have been embroiled in a series of lawsuits, mostly self-initiated, stemming from those incidents. Jurisdiction over the instant appeals, which mark the last of the Zahran's claims, is based on the diversity statute; Wisconsin substantive law and federal procedural rules therefore apply. *See* 28 U.S.C. § 1332; *Kuehn v. Children's Hosp.*, 119 F.3d 1296, 1300-01 (7th Cir.. 1997); *Mace v. Van Ru Credit Corp.*,

The relevant facts are these: the Zahrans entered a contract with Cleary Building corp. ("Cleary") and its agent, Ralph Uecker & Sons, Inc. ("Uecker"), for the repair of a fire-damaged barn complex at the Zahran's dairy farm. Because of the onset of winter, the Zahrans requested that construction be commenced around November 1, 1990, and that it be completed within three to four weeks. It would appear, however, that work did not begin until December 1990, and that it was not completed until mid-January 1991. The Zahrans sued, alleging breach of contract, fraudulent inducement, breach of the duties of good faith and fair dealing, negligence, and the filing of a fraudulent lien. The defendants countered that November 1 was merely a tentative date, dependent on Cleary's work backlog, variables such as the weather and materials availability, and Robin Zahran's preparation of the work site preparation until December, thereby preventing Cleary from timely commencing the work, and that Robin Zahran had failed to provide certain agreed-upon construction materials. Following deliberation, the jury returned a special verdict, finding: 1) that plaintiffs and defendants had not agreed that the repair on the barn complex would begin on November 1, 1990; 2) that the defendants did not fail to substantially perform the contract; 3) that the Zahran's affirmatively hindered the defendants' ability to perform the repairs pursuant to the

contract; and 4) that the Zahrans should take nothing under their complaint.

The Zahrans filed a post-verdict, 61 page omnibus motion entitled "Plaintiffs' Motion for Judgment Notwithstanding the Verdict or in the Alternate a Declaration of a Mistrial or in the Alternate a New Trail." the district court, however, correctly concluded that the Zahrans' post-verdict submission could not be construed as a renewed motion for judgment as a matter of law, *see* Fed. R. Civ. P. 50(b), because they had failed to file a Rule 50(a) motion for judgment as a matter of law *before* the case was submitted to the jury. *See, e.g., Mid-America Tablewares, Inc. v. Mogi Trading co., Ltd.*, 100 F. 3d 1353, 1363-64 (7th Cir. 1996); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1139-40 (7th Cir. 1994); 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedures §§ 2521, 2537 (2d ed. 1995 & Supp. 1998). The district judge then ruled that the Zahrans were not entitled to relief when their motion, which was filed within ten days of the entry of judgment, *See* Fed R. Civ. P. 6(a), 59(b), was construed as a Rule 59 motion for a new trial or to alter or amend the judgment. *See id.* Rule 59(a), (e); *Umpleby v. Potter & Brumfield, Inc.*, 69 F.2d 209, 212-23 (7th Cir. 1995); *Kladis v. Brezek*, 823 F.2d 1014, 1017 (7th Cir. 1987). Rule 59(a) allows the court to grant a motion for a new trial "for any of the reasons for which new trials have heretofore been granted," and Rule 60 permits the court, in the exercise of its sound discretion and upon terms that are just, to grant a new trial based on fraud, misrepresentation, or other misconduct. *See* Fed. R. Civ. P. 59(a), 60 (b)(3); *Wharf v. Burlington Northern R.R. Co.*, 60 F. 3d 631, 637 (9th Cir. 1995). We review Rules 59 and 60 motions deferentially and will reverse only if the district court abused its discretion in granting or denying the motion. In addition, we must determine whether the clear

weight of the evidence is against the jury verdict or for some other reason the trial was basically unfair to the moving party. *See Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995).

Thought the Zahrans contend on appeal that opposing counsel tainted the verdict by removing without authorisation a critical exhibit, one of several copies of the disputed contract, that should have gone to the jury along with the other exhibits, we conclude that they failed to establish either that counsel engaged in misconduct or that the challenged conduct prevented them from fully and fairly presenting their case. *See, e.g., Provident Savings Bk. v. Popovich*, 71 F.3d 696, 698-700 (7th Cir. 1995); *Lonsdorf*, 47 F.3d at 897. After the Zahrans filed their motion in the district court, opposing counsel filed a response, accompanied by an affidavit, in which he declared that he had indeed removed one of a number of copies of the disputed contract from a stack of exhibits on the clerk's table. He averred that Defendants' Proposed Exhibit 227, which he removed, had not been offered or received into evidence, and in any event was identical to Plaintiffs' Exhibit 4A, which *was* admitted into evidence and sent to the jury. It is unclear from appellant's submissions whether they believe that only Exhibit 4A and other versions of the disputed contract were submitted to the jury, whether they believe that neither Exhibit 4A nor Proposed Exhibit 227 were submitted to the jury with the other versions of the contract but should have been, or whether they believe that neither Exhibit 4A nor Proposed Exhibit 227 should have been tendered to the jury. Nonetheless, the district court found no indication that the Zahrans had raised timely objections to opposing counsel's conduct or had otherwise challenged any of the exhibits submitted to the jury. *See DeBiasov. Illinois Central R.R.* 52 F.3d 678, 685 (7th Cir. 1995); *Deppe v. Tripp* 863 F.2d 1356, 1360-65 (7th Cir. 1988): Consequently, there is no reason to conclude that the district

court abused its discretion in declining to grant a new trial, and nothing in the record supports a contrary conclusion.

Appellants next argue that despite his certification of familiarity with the record, District Judge Charles N. Clevert abused his discretion by failing to grant a new trail after district Judge Robert A. Warren became ill and withdrew from the case. *See* Fed. R. Civ. P. 63; *Mergentime Corp. v. Washington Metro. Area Transit Auth.*, 166 F.3d 1257, 1262-65 (D.C. Cir. 1999); *Townsend v. Gray Line Bus Co.*, 767 F.2d 11, 17-18 (1st Cir. 1985); 11 Wright & Miller, *supra*, §§ 2921-22. The Zahrans do not suggest, however, that they objected to the substitution of judges, moved for a new trial prior to the return of the adverse verdict, or otherwise expressed any reservation about continuing before Judge Clevert. Neither do they now identify specific rulings they believe are erroneous and which ware attributable to a lack of familiarity with he evidence or with Judge Warren's prior findings or conclusions. In addition, we note that because this case was tried to a jury, the trial of fact served continuously during the course of trial. As this court observed a related context, litigants who were willing to take their chances before a second judge cannot complain on appeal because the case was decided against them. By consenting to the substitution the Zahrans waived any appellate objection on that ground. *See Milbrew, Inc. v. Commissioner*, 143 F.3d 1393, 1399-1401 (11th Cir. 1998) (same).

Appellants also take issue with the district court's decision to permit opposing counsel to impeach Robin Zahran's credibility on cross-examination. Rule 608(b) permits inquiry about specific acts that are probative of the witness' character for truthfulness or untruthfulness. *See* Fed. R. Evid. 608 (b)(1) Opposing counsel first asked Mr. Zahran whether he had received a degree in mathematics and physics from the

Massachusetts Institute of Technology in 1973. Zahran declared, "No." Counsel then asked whether Mr. Zahran had ever testified under oath that he did receive such a degree; after Mr. Zahran became evasive, opposing counsel tendered a transcript to the Zahran's attorney. Reading from a second copy, opposing counsel then asked Robin Zahran whether he recalled ever having given during a deposition the following responses to the following questions:

"Q. 'And where did you go to college?'"
"A. 'In Boston.'"
"Q. 'And what school in Boston?'"
"A. 'MIT.'"
"Q. 'Did you get a degree?'"
"A. 'Yes.'"
"Q. 'What was your degree in?'"
"A. 'Math and physics."
"Q. 'And what year did you get that degree?'"
"A. Nineteen seventy-three . . .'"

Q. Do you recall giving those answers to those questions under oath . . ?
A. Yes . . .

Appellants now argue that this line of inquiry was irrelevant, highly prejudicial, and that opposing counsel's use of the transcript amounted to the improper admission of extrinsic evidence tot prove up a collateral matter. The Zahrans are mistaken, however, first because cross-examination questions are not "extrinsic evidence," *see United States v. Drake*, 932 F.2d 861, 866-67 (10th Cir. 1991), and second because the transcript was not admitted into evidence, see *United States v. Olivo*, 80 F.3d 1466, 1470-71 (10th Cir. 1996). Though the Zahrans' attorney timely objected on the basis of relevance, *see* Fed. R. Evid. 103(a), 402, the district judge, who permitted the witness to be impeached by contradiction, correctly concluded

that the prior testimony was relevant insofar as to pertained to Robin Zahran's character for truthfulness or untruthfulness, *see United States v. Higa*, 55 F.3d 448, 451-52 (9th Cir. 1995); *Chnapkova v. Koh*, 985 F.2d 79, 82-83 (2nd Cir. 1993); *Simmons, Inc. v. Pinkertons, Inc.* 762 F.2d 591, 604-05 & n.7 (7th Cir. 1985). In the proper exercise of its sound discretion, the district court thus permitted opposing counsel to examine Robin Zahran about a specific instance of prior conduct bearing on the witness' credibility, a central question during the course of trail. Of course, had the witness flatly denied the conduct, opposing counsel would have been bound by the witness' answer, since extrinsic evidence to prove the specific act is inadmissible under Rule 608(b). *See Olivo*, 80, F.3d at 1470-71; *Higa*, 55 F.3d at 452.

Finally, appellants suggest that the district court abused its discretion by granting the defendants' motion for Rule 11 sanctions. *See* Fed. R. Civ. P. 11. In support of their position, the Zahrans explain that early in the litigation the defendants had filed a motion for summary judgment. The district court ruled in part that while the Zahrans were precluded from *re-litigating* the validity of a lien placed on their barn by Cleary they were not estopped from litigating for the first time the other issues raised in the complaint. On this basis the district judge granted in part and denied in part the defendants' motion for summary judgment. Appellants now argue that because they stipulated to a dismissal of the fraudulent lien count shortly after the summary judgment ruling, they should not have been sanctioned.

The Zahrans have misperceived the scope and purpose of Rule 11, which intended to give a litigant pause to "stop, think, and investigate more carefully" before filing papers, thereby streamlining the administration and procedure of the federal courts. *Cooter & Gell v. Hartmarz Corp.*, 496 U.S. 384, 393-94 (1990) (internal quotation and citation omitted).

As this court has explained, where there is no reasonable basis for the submission or where the filing is pursued for an improper purpose, a violation of Rule 11 is complete when the offending paper is filed with the district court. A subsequent withdrawal of the frivolous matter does not shield a litigant from the possibility of sanctions. *See Szabo Food Sev., Inc. v. Canteen Corp.*,823 F.2d 1073, 1077, 1089 (7th Cir. 1987); *see also Cooter & Gell*, 496 U.S. at 395-98; *Mars Steel Corp. v. continental Bk. N.A.*, 880 F.2d 928, 931-33 (7th Cir. 1989) Here, the validity of Cleary's lien on the Zahrans' barn had been fully and fairly litigated in state court, and had been resolved adversely to the position the Zahrans asserted in federal court; the doctrine of issue preclusion thus prevented them from re-litigating the lien's validity. *See* 28 U.S.C. § 1783; *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995); *Northern States Power Co. v. Bugher*, 525 N.W. 2d 723, 727 (Wis. 1995); *Lindas v. Cady*, 515 N.W. 2d 458, 463 (Wis. 1994). Any reasonable inquiry into the matter prior to filing would surely have revealed the impediment to re-litigation of this issue, and nothing the Zahrans have pointed to in the record casts any doubt on the district court's conclusion that the fraudulent lien count was filed for improper purposes. *See* Fed. R. Civ. P. 11(b)(2), (c)(2); *Automatic Liquid Packaging, Inc. v. Domonick*, 909 F.2d 1001, 1003-05 (7th Cir.. 1990). Given that the "central purpose" of the rule is "to deter baseless filings" in the district courts, and that any application of the rule should take into account the rule's central goal, *Cooter & Gell*, 496 U.S. at 393, 397-98; *see also Retired Chicago Police Ass'n v. firemen's Annuity & Benefit Fund*, 145 F.3d 929, 933, 935-36; *Szabo*, 823 F.2d at 1077, we cannot conclude that the district court abused its discretion in awarding the defendants a $1500 sanction against the Zahrans. While as a general rule district courts should articulate the bases for such awards, they

need not belabor the obvious where, as here, the reasons are apparent from the record. *See Szabo*, 923 F.2d at 1084.

Appellants raise a number of additional issues before this court but their arguments are either insufficiently developed, are unsupported by authority or citation to the record, or are raised for the first time in their reply brief. We therefore decline the Zahrans' invitation to address these matters. *See, e.g.*, Fed R. App. P. 28(a)(9), (e); 7th Cir. R. 28(c); *Finance Inv. Co. (Bermuda) Ltd. v. Gerit AG*, 165 F. 3d 526, 531 (7th Cir. 1999); *Day v. NIPS Co.*, 164 F.3d 382, 384 (7th Cir. 1999); *John v. Barron*, 897 F.2d 1387, 1392-94 (7th Cir. 1990). Accordingly, the decision of the district court is **AFFIRMED.**

**UNITED STATES COURT of APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
June 28, 1999

*Before*

| | |
|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeals from the United )States District Court for )the Eastern District of )Wisconsin |
| Nos. 99-1618 v. | ) |
| CLEARY BUILDING CORP., a Wisconsin corporation, and RALPH UECKER AND SONS, INCORP. Defendants-Appellees. | )No. 93 C 543 )Charles N. Clevert, ) Judge |

**ORDER**

The following is before the Court:

1. **MOTION TO STRIKE APPELLEE'S BRIEF,** filed on June 15, 1999, by the pro se Appellants.

2. **CLEARY BUILDING CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE CLEARY'S RESPONSE BRIEF,** filed on June 25, 1999, by counsel for Appellee Cleary Building.

Pursuant to Fed. R. App. P. 31(a)(1), because Appellants filed their opening brief on April 26, 1999, Appellees were required to serve and file their brief within thirty (30) days

after service of Appellants' brief, or May 27, 1999. Appellee Ralph Uecker & Sons, Inc.'s brief was mailed on May 28, 1999, and filed in on June 1, 1999, while Appellee Cleary Building Corp.'s brief was mailed on June 1, 1999, and filed on June 4, 1999. Appellants contend that because Appellees' briefs were not filed by May 27, 1999, they were untimely and should therefore be stricken. Because Appellants have misunderstood the interplay amongst the various Federal Rules of Appellate Procedure, their motion must be denied.

Although on the surface it appears that Appellees' briefs were in fact untimely, a careful reading of the applicable rules shows this to be false. First, appellants served their opening brief by mail, which in turn entitled Appellees to three additional days, or until May 30, 1999, to file their briefs. Fed. R. App. P. 26(c). However, because May 30, 1999 was a Sunday, the filing time carried over to Monday May 31, 1999. Fed. R. App. P. 26(a)(3). Then because Monday May 31, 1999 was Memorial Day, a legal holiday, Fed. R. App. 26(a)(4), Appellees' briefs were not due until Tuesday June 1, 1999. Finally, Fed. R. App. Proc. 25(a)(2)(B)(ii) provides that "[a] brief or appendix is timely filed . . . if on or before the last day for filing, it is (i) mailed to the Clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; . . ." The Appellees' proof of service, which is attached to appellants' motion, demonstrates that both briefs were mailed on or before the last day for filing, June 1, 1999. Thus, Appellees' briefs were timely filed.

Accordingly, for the reasons set forth above, appellants' motion to strike Appellees' brief is **DENIED.**

**United States Court of Appeals**
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

Date: July 13, 1999

To: Sofron B. Nedilsky
United States District Court
Eastern District of Wisconsin
Room 362
517 E. Wisconsin Ave.
U.S. Courthouse & Federal Building
Milwaukee, WI 53202
From: Gino J. Agnello, Clerk

Re: 97-3813
Zahran, Robin v. Cleary Bldg Corporate
93 C 543, Charles N. Clevert, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of costs, is any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to the costs shall constitute the mandate.

[X] No record file
[ ] Original record on appeal consisting of:

| Enclosed: | | To Be Returned At Later Date: |
|---|---|---|
| [ ] | Volumes of pleadings | [ ] |
| [ ] | Loose pleadings | [ ] |
| [ ] | Volumes of transcripts | [ ] |
| [ ] | Volumes of exhibits | [ ] |

[ ] Volumes of depositions [ ]
[ ] In Camera material [ ]
[ ] Other [ ]
Record being retained for us [ ]
in Appeal No.

Copies of this notice sent to: Counsel of record
[ ] United States Marshal
[ ] United States Probation Office

Note To Counsel:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.